

No. 2400

United States Circuit Court of Appeals

Ninth Circuit

Appeal from the District Court of the United
States for the District of Oregon

OREGON & CALIFORNIA RAILROAD

COMPANY, A Corporation, *et al.*,

Defendants and Appellants

JOHN L. SNYDER, *et al.*,

Cross-Complainants and Appellants

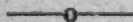
WILLIAM F. SLAUGHTER, *et al.*,

Interveners and Appellants

vs.

THE UNITED STATES OF AMERICA

Appellee



TRANSCRIPT OF RECORD

VOLUME XVIII

PAGES 8820-9045

TITLE

NAMES AND ADDRESSES OF SOLICITORS UPON THIS APPEAL

For Appellants

OREGON & CALIFORNIA R. R. CO., et al.:

WM. F. HERRIN,
P. F. DUNNE,
J. E. FENTON,
San Francisco, Cal.
WM. D. FENTON,
Portland, Oregon.

For Appellant—UNION TRUST COMPANY,
DOLPH, MALLORY, SIMON & GEARIN,
Portland, Oregon.
MILLER, KING, LANE & TRAFFORD, and
JOHN C. SPOONER,
New York.

For Appellants—JNO. L. SNYDER, *et al.*:
A. W. LAFFERTY,
Portland, Oregon.

For Appellants—WM. F. SLAUGHTER, *et al.*:
L. C. GARRIGUS,
A. W. LAFFERTY,
MOULTON & SCHWARTZ,
Portland, Oregon.
DAY & BREWER,
Seattle, Wash.
A. C. WOODCOCK,
Eugene, Oregon.

For Appellee:

JAMES C. McREYNOLDS,
Attorney General.
CLARENCE L. REAMES,
U. S. Dist. Attorney for Oregon.
B. D. TOWNSEND,
F. C. RABB,
Special Assistants to the Attorney General.

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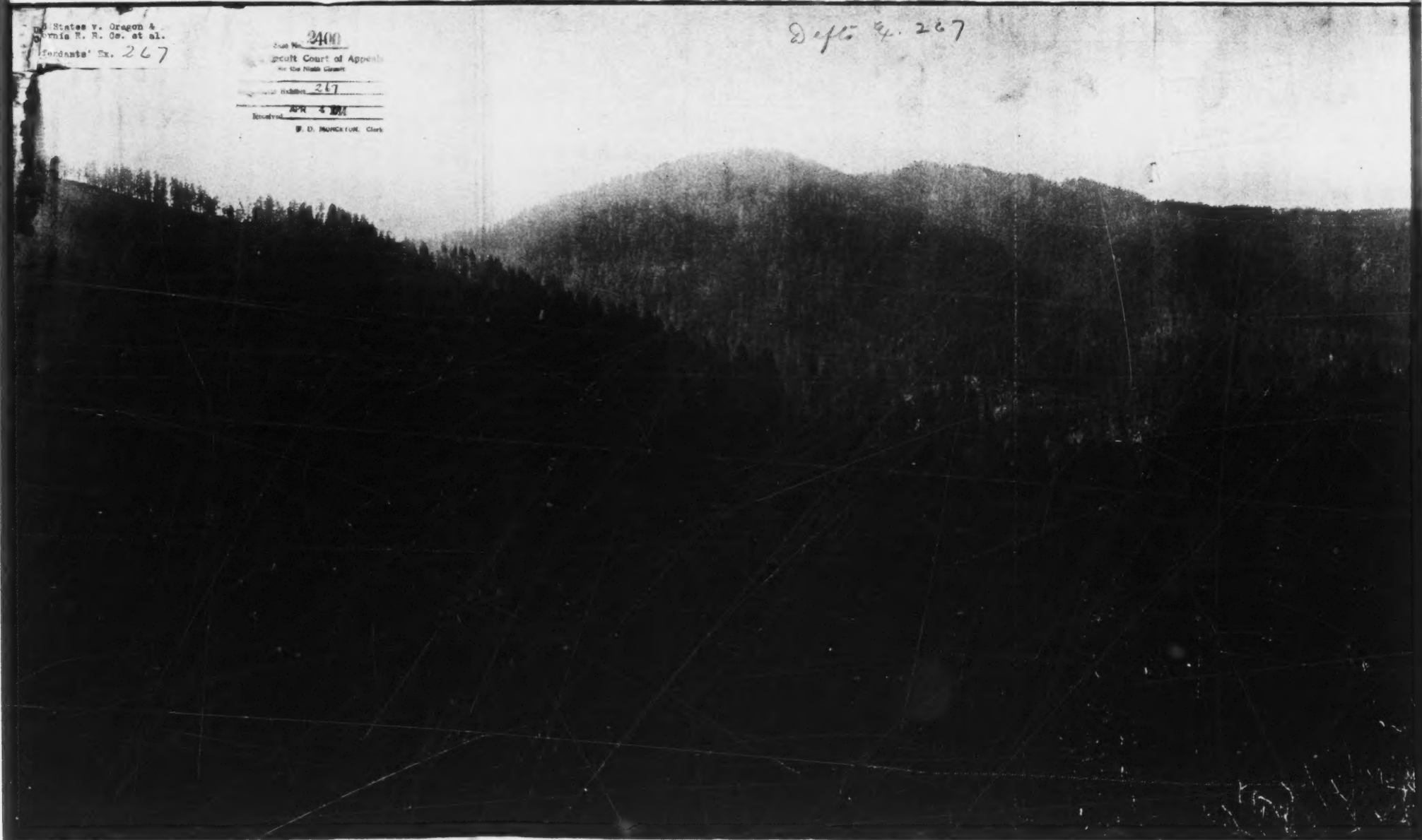
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States v. Oregon &
P. & N. R. Co. et al.
Defendants' Ex. 267

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for the Ninth Circuit
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W. D. HANCOCK, Clerk

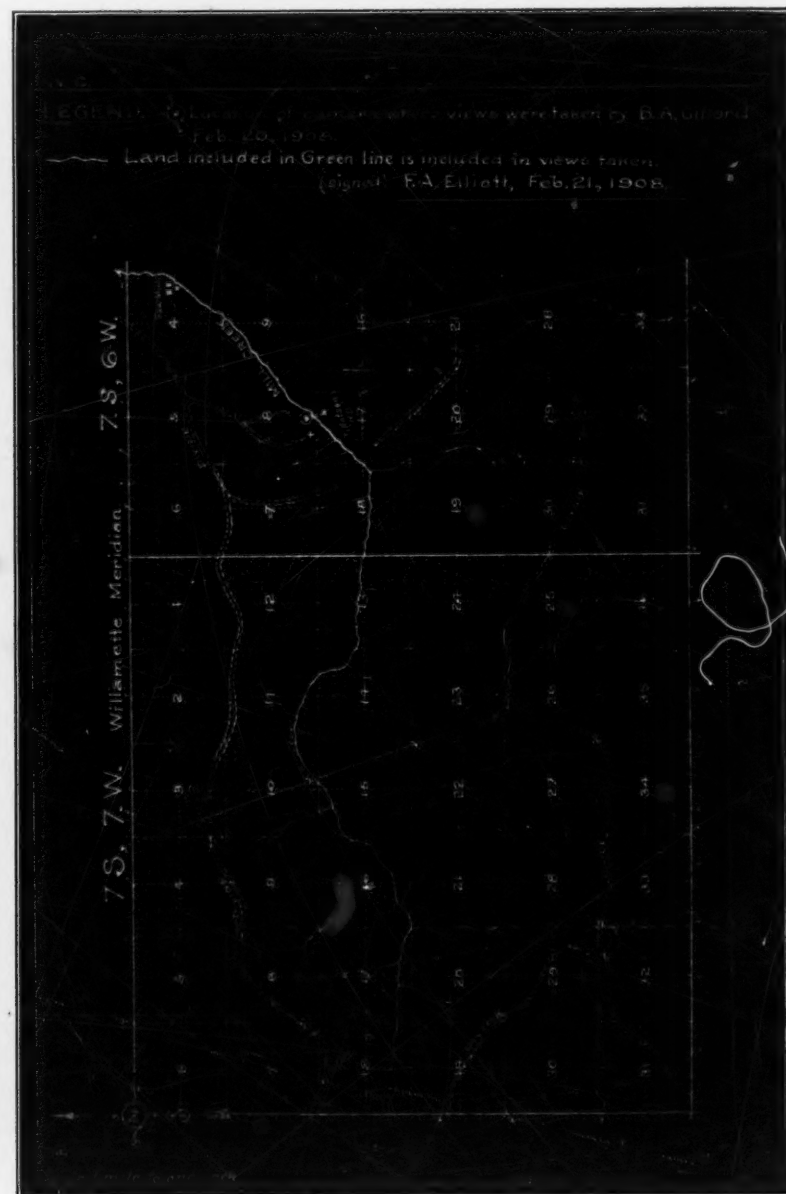
Def's Ex. 267

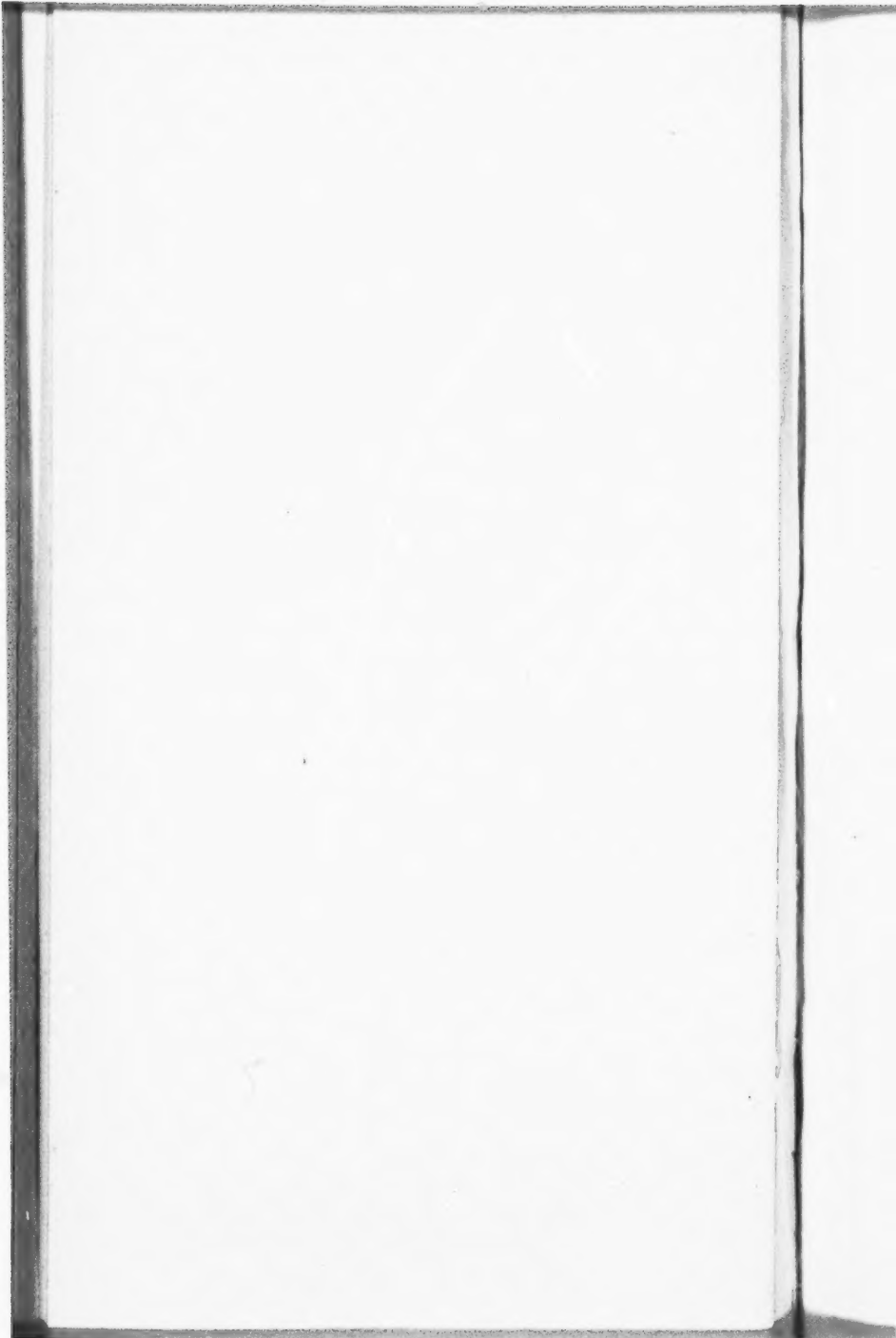


DEFENDANTS' EXHIBIT 267



[Endorsed:] United States v. Oregon & California R. R. Co. et al. Defendants' Ex. 267. Filed May 10, 1913, A. M. Cannon, Clerk U. S. District Court. Case No. 2400. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit No. 267. Received Apr. 4, 1914. F. D. Monckton, Clerk.





DEFENDANTS' EXHIBIT 267 (Copy)

Portland, Oregon, February 22, 1908.
Mr. Charles W. Eberlein,
Acting Land Agent, O. & C. R. R. Company,
San Francisco, California.

Dear Sir:

We are sending you today, from The Dalles, Oregon, where the same have been completed by Mr. B. A. Gifford, photographer, two prints each of two views taken by Mr. Gifford, on February 20th, 1908, from a point in the South half of Section 8, Township 7 South, Range 6 West, showing, in so far as possible, view of Township 7 South, Range 7 West and western portion of Township 7 South, Range 6 West. These views show in a general way the character of the central portion of Township 7 South, Range 7 West, and include that part thereof covered in the affidavit of Mr. Homer D. Angell and Mr. B. A. Gifford, and tracing accompanying the same.

The tracing sent you herewith shows the point in the South Half of Section 8, Township 7 South, Range 6 West, on which the camera stood at the time the views were taken. The two views cover the same territory, the only difference being the land immediately adjacent to the point from which the views were taken, the hatched line on tracing showing land included in view No. 2 that was not included in view No. 1. The camera, in View No. 1, was so placed as to expose the negative pointing southeast and was gradually moved until it reached the direction of North 75° West, thus taking in an angle of 150 degrees. In view No. 2 the negative

was first exposed with the camera point southeast, and gradually moved westerly until it pointed northwest, taking in an angle of 180°.

You will understand from examination of the tracing that the irregular tract included in the view is due to the fact that high divides and mountain ranges cut off the view along the lines shown by the green on the tracing.

To said tracing and said views we have attached affidavits of Mr. Angell, Mr. Elliott and Mr. Gifford, stating when said views were taken, from what point and what territory was covered; and further that the character of the land and timber shown in said views is practically the same as the balance of the township and also of the western part of 7 South, 6 West.

We also enclose two prints of photograph of improvements on homestead embracing the E $\frac{1}{2}$ of NW $\frac{1}{4}$ and the W $\frac{1}{2}$ of NE $\frac{1}{4}$ of Section 17, Township 7 South, Range 6 West. The improvements shown in this photograph are the only improvements on the homestead, which was taken up by homestead entry of H. D. Tillotson, a good many years ago, and is now owned by Wessley Atchinson and William McHardy. No land on this homestead has been cleared, about two acres surrounding the house having been slashed. This perhaps is the best "improved" tract of land taken as a homestead in any of the territory covered by the two panoramic views. We give you this view for the purpose of showing the nature of the so-called improvements on homesteads taken in this vicinity.

We also hand you herewith small township plats showing the amount of standing timber on each

section in Township 7 South, Range 7 West, and Township 7 South, Range 6 West, as shown by cruises made by Polk County during the summer of 1907 for the purposes of assessment. You will note from the figures shown on the sections that the township is timbered evenly throughout, with the exception of some of the eastern portion of Township 7 South, Range 6 West. These figures are authentic, in so far as the County cruise went. From these cruises you will see that Township 7 South, Range 7 West, is a solid body of timber throughout and as shown by the panoramic views is very rough in character and not susceptible of settlement and cultivation.

In accordance with your telegram of February 15th, we rushed this work through in order to get the photographs to you by the 24th inst., which is ten days from the date of your telegram, and in so doing we were unable to take views of individual claims in the township or take any more views than those we send today. If you desire individual views of the various claims in the township, as outlined in our conversation when you were in Portland, if you will so advise we shall make arrangements to have the same taken; also in Township 27 South, Range 9 West.

Very respectfully,

ANGELL & FISHER

(Signed) Per Homer D. Angell

STATE OF OREGON }
COUNTY OF MULTNOMAH } SS.

We, F. A. Elliott, of Newberg, Yamhill County, State of Oregon, by occupation timber estimator and land examiner, and Homer D. Angell, of Portland, Multnomah County, State of Oregon, being first duly sworn, depose and say:

That we are well acquainted with the character of the land in Township 7 South, Range 6 West, and Township 7 South, Range 7 West, and that Mr. F. A. Elliott, for himself, deposes and says that he has frequently been thereon and that he had charge of the cruising of these two townships during the summer of 1907;

And we further depose and say, that the attached tracing within the limits of the green lines, shows the scope of country included within the two views taken by Mr. B. A. Gifford, from a point within the South Half of Section 8, Township 7 South, Range 6 West, on the 20th day of February, 1908; that we were present when said views were taken, and that we are familiar with the territory covered by said views; that the said views cover in general the following lands in said townships:

In Township 7 South, Range 6 West: Section 18, and portions of Sections 7, 8, 16, 17, 21, 20, 19 and 30, and

In Township 7 South, Range 7 West: Sections 24, 16 and 17, and portions of Sections 13, 14, 15, 10, 9, 8, 7, 18, 19, 20, 21, 22, 23 and 25.

We further depose and say that the scope of territory described above as covered by said views and by tracing herewith, shows the general character of the township in regard to the timber there-

on; that the same is timbered in about the same proportion throughout the entire township of 7 South, Range 7 West; and that the scope covered in Township 7 South, Range 6 West, is the general average of the timber throughout the western portion of said Township 7 South, Range 6 West.

(Signed) F. A. ELLIOTT

(Seal). (Signed) HOMER D. ANGELL

Subscribed and sworn to before me this 21 day of February, A. D. 1908.

(Signed) FOREST S. FISHER
Notary Public for Oregon.

State of Oregon }
County of Wasco } ss.

I, B. A. Gifford, of The Dalles, Wasco County, State of Oregon, being first duly sworn depose and say that I am by occupation a photographer; that on the 20th day of February, 1908, accompanied by Mr. F. A. Elliott, Mr. Homer D. Angell and Mr. L. D. McLeod, I went to a point in the South Half of Section 8, Township 7 South, Range 6 West, W.M., and from said point took two panoramic views of the surrounding country, copies of which said views are attached hereto; and that said views cover a distance of about eight miles westerly through the central portion of Township 7 South, Range 7 West, and also a portion of the western part of Township 7 South, Range 6 West; and I further depose and say upon observation of the ground and from information and belief, that the

attached views cover the following portions of Township 7 South, Range 6 West: Section 18, and portions of Sections 7, 8, 16, 17, 21, 20, 19 and 30; and on Township 7 South, Range 7 West: Sections 24, 16 and 17, and portions of Sections 13, 14, 15, 10, 9, 8, 7, 18, 19, 20, 21, 22, 23 and 25; and that the views show the general character of the country and timber in the entire locality covered in Township 7 South, Range 7 West, and the western part of Township 7 South, Range 6 West.

(Signed) B. A. GIFFORD

Subscribed and sworn to before me this 2nd day of February, A. D. 1908.

(Signed) HOMER D. ANGELL

(Seal)

Notary Public for Oregon.

[Endorsed] Defts. Ex. 267. Filed May 10, 1913, A. M. Cannon, Clerk U. S. District Court.



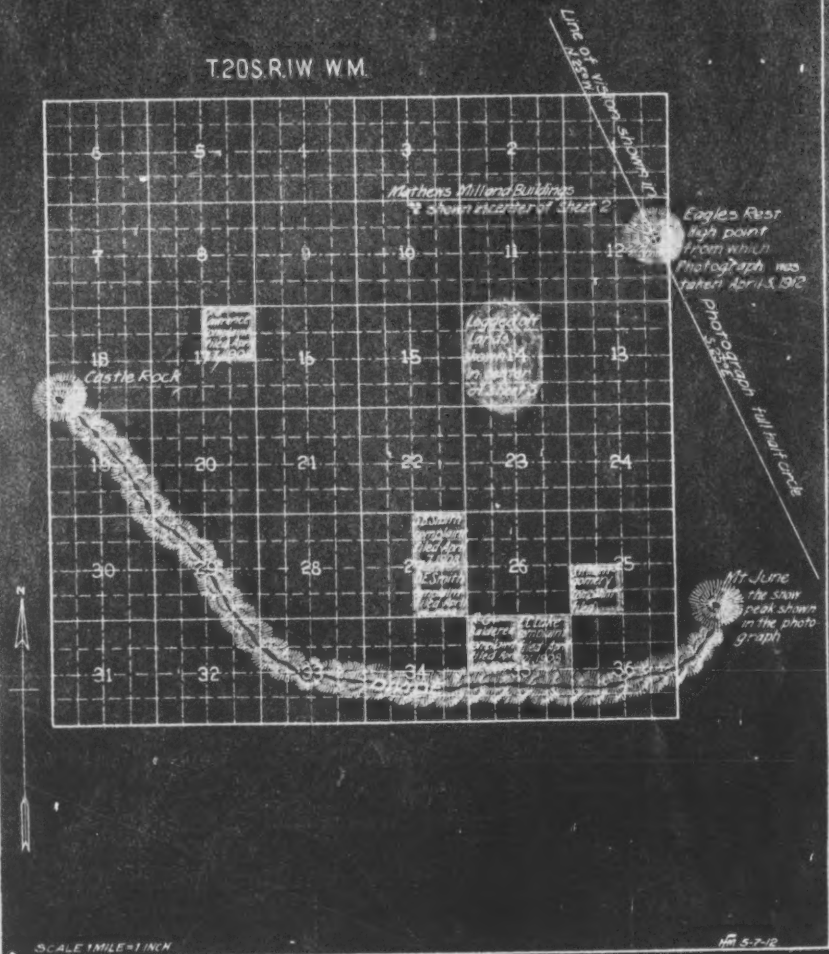


[Endorsed] United States v. Oregon & California R. R. Co. et al. Defts. Ex. 268. Filed May 10, 1913, A. M. Cannon, Clerk U. S. District Court. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 268. Received April 4, 1914. F. D. Monckton, Clerk.

PLAT SHOWING TERRITORY EMBRACED IN PHOTOGRAPHS

NUMBERED 2867-1 TO 4, 2868-1 & 2, AND 2869. SEE A.W. REES, LETTER APRIL 15, 1912.

T20S.R1W WM.



Portland, Ore.,
April 15, 1912.

Mr. B. A. McAllaster,
Land Commissioner,
San Francisco, Cal.

Dear Sir:

I am sending you under separate cover two copies of panoramic view of Township 20 S Range 1 W, taken by Mr. Gifford from a point near the quarter post on E line of Sec. 12, April 3rd 1912. Also two copies of a smaller view (two prints) of the NE corner of Township and two copies of a small view of "Eagle Rest" from the top of which the panoramic view was taken. I also enclose plat upon which I have shown the point from which the photograph was taken, location of Matthews' Mill, the logged off area, Mt. June and the various tracts connected with the Lafferty suits.

The panoramic view shows a full half circle and takes in the greater part of Township as far south and west as the divide. Print One (to the right) shows a view looking north into the Willamette Valley. Print Two shows Matthews' Sawmill and buildings in the center of the print. The top of "Castle Rock" located in Section 19, can be seen above and to the left of the second fir tree. The SE $\frac{1}{4}$ of Section 17 lies on the first ridge below the summit and near the left-hand side of print Two. The logged-off lands in center of print Three are in Section 14. Sections 25, 27 and 35 are well up on the summit of the mountain, and as nearly as I can tell, would be shown in print Four; possibly Section 27 is on print Three. The snow-covered peak at the left is Mount June. The East line

of the township is very near the foot of Mount June on the right-hand side.

There are no settlements in this township, except a few small ranches and a sawmill in the northern part of the township, and these are confined to the bottom lands along the creeks. One or two of the settlements are shown in the second section of the photograph.

This picture was taken upon a very cloudy day and the atmosphere was not clear; consequently it is not as good a view of the township as I had hoped to obtain. It would probably have been better to have taken the picture from some point farther south, so that a closer view of the southern part of the township could have been had; although it is difficult to get a view point on account of the density of the timber, in which there are no open points from which a view can be taken.

Mr. Gifford says he could not have gotten a better picture with the large camera, under same conditions, in fact, he does not think it would have shown up at a distance as distinctly as the smaller camera with which this picture was taken.

I have had three sets of these pictures printed, but am sending you only two sets at the present time. Will forward the others later if you desire them. Mr. Gifford's charge for the three sets of pictures are as follows:—

3 days' time at \$5.00 per day	\$15.00
7 negatives at 50c each	3.50
3 sets pictures (21 prints) at 50c each	10.50
Express charges on camera50
	<hr/>
	\$29.50

Will you please advise me whether such photographs will be satisfactory, or whether I shall have pictures in future taken with the large camera, which of course would cost a great deal more; not only for negatives and prints, but in field work as well, as the large camera weighs about 300 pounds, making it more difficult and expensive to handle in the mountains.

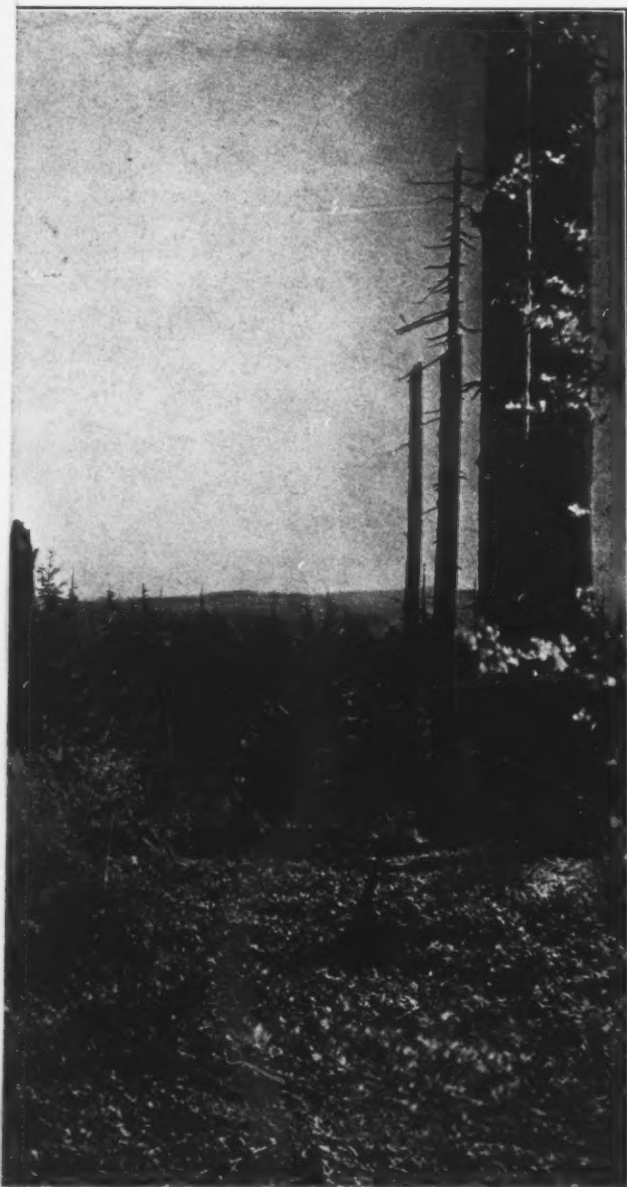
Yours truly,

(Signed) A. W. Rees

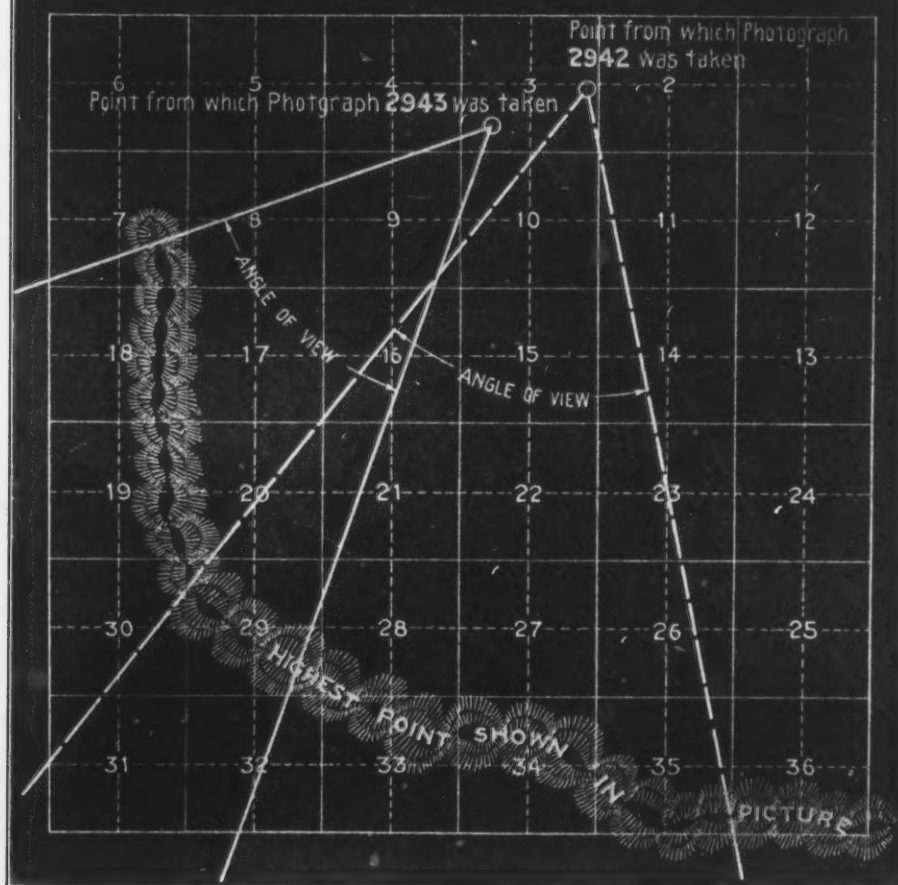
Manager

AWR/T





T.4 N. R.3 W. W.M. Columbia County, Oregon.



The following is noted on the photograph:

Photograph No. 2942 was taken from the NE of SE, looking south, 25° west; and photograph No. 2943 from the SW of SW, looking south 45° west. These were taken on an 8 x 10 plate, and enlarged to 16 x 20. Mr. Gifford was unable to get a photograph from either place taking in a wider territory on account of the standing timber. Weather conditions were not at all favorable to panoramic work. (See letter A. W. Rees, June 28, 1912—File 464)



The following is noted on the photograph:

Photograph No. 2942 was taken from the NE of SE, looking south, 25° west; and photograph No. 2943 from the SW of SW, looking south 45° west. These were taken on an 8 x 10 plate, and enlarged to 16 x 20. Mr. Gifford was unable to get a photograph from either place taking in a wider territory on account of the standing timber. Weather conditions were not at all favorable to panoramic work. (See letter A. W. Rees, June 28, 1912—File 464)

[Endorsed] United States v. Oregon and California R. R. Co. et al. Defts'. Ex. 269. Filed May 10, 1913, A. M. Cannon, Clerk U. S. District Court. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 269. Received Apr. 4, 1914. F. D. Monckton, Clerk.



DEFENDANTS' EXHIBIT
270

CONSISTS
OF 93 PHOTOGRAPHS
AS FOLLOWS:



1. View looking SE, of the cabin of Julius F. Prahl, on SW $\frac{1}{4}$, Sec. 17, T. 4 N., R. 3 W., W.M., about 20 rods N. and 10 rods W. of location of Qr. corner on S line of Sec. 17.

Photograph by Fred H. McClure, Dec. 5, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 1. Defia. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-1. Received March 28, 1914. F. D. Monckton, Clerk.



2. View, looking SW,
of cabin of Julius F.
Prah, on SW $\frac{1}{4}$, Sec. 17,
T. 4 N., R. 3 W., W.M.,
about 20 rods N. and 10
rods W. of location of
Qr. corner on S. line of
Sec. 17.

Photograph by Fred H.
McClure, Dec. 5, 1907.
(Signed) Ben Irwin.

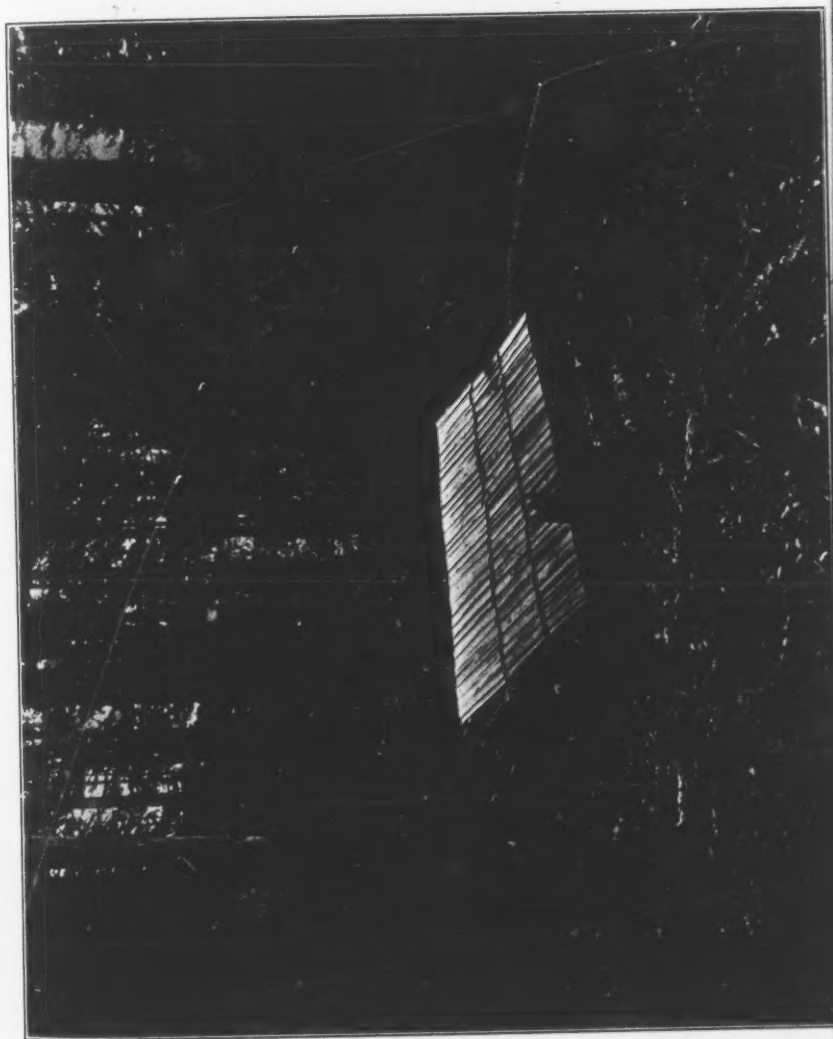
[Endorsed] No. 2. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-2. Received March
28, 1914. F. D. Monckton, Clerk.



3. View, looking N., of cabin of Julius F. Prah, on SW $\frac{1}{4}$, Sec. 17, T. 4 N., R. 3 W., W.M., about 20 rods N and 10 rods W. of location of Qr. corner on S line of Sec. 17.

Photograph by Fred H. McClure, Dec. 5, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 3, Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-3. Received March 28, 1914. F. D. Monckton, Clerk.

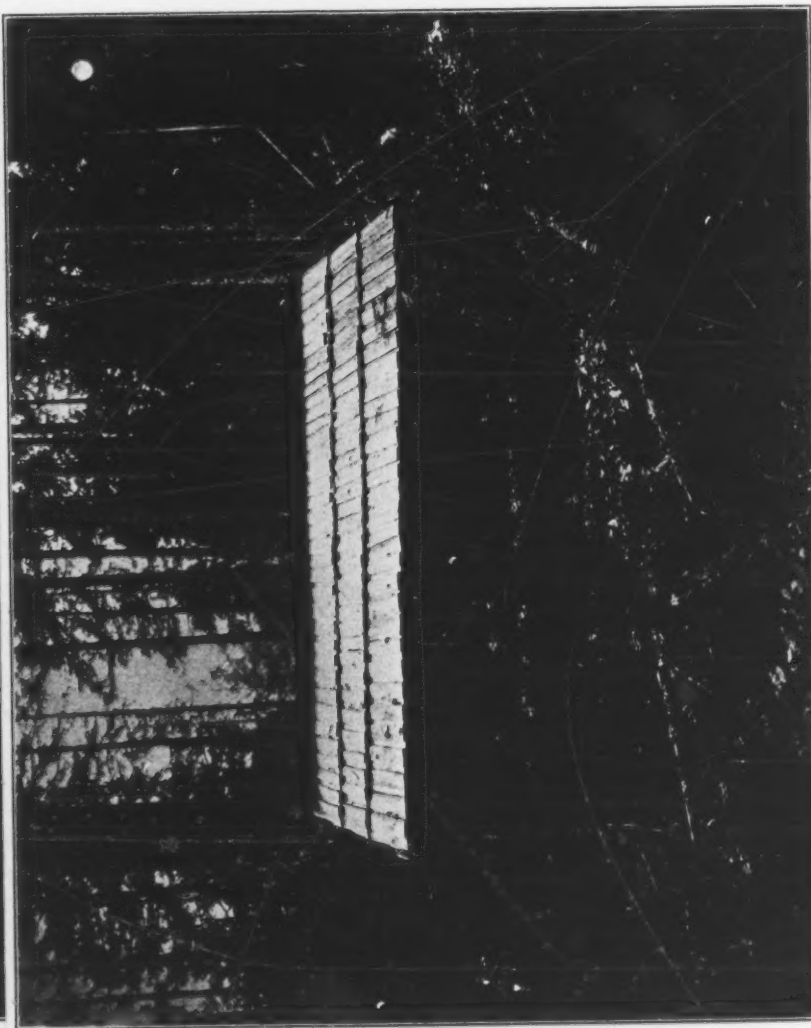


5. View, looking SE., of cabin of Jas. Barr, intended to be placed on E $\frac{1}{2}$ of NE $\frac{1}{4}$ and E $\frac{1}{2}$ of SE $\frac{1}{4}$, Sec. 9, T. 4 N., R. 3 W., W.M.

This cabin, according to line as paced by A. W. Rees and by Ben Irwin, is probably situated about 6 rods North and 5 rods West of the NW cor. of NE $\frac{1}{4}$ of NE $\frac{1}{4}$, said Sec., being on Sec. 8.

Photograph by Fred H. McClure, Dec. 6, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 5. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270-5. Received March 28, 1914. F. D. Monckton, Clerk.



8. View, looking west, of the cabin of James Barr, intended to be placed on E $\frac{1}{2}$ of NE $\frac{1}{4}$ and E $\frac{1}{2}$ of SE $\frac{1}{4}$, Sec. 9, T. 4 N., R. 3 W., W.M., but probably on Sec. 8, per lines paced by Rees and by Irwin, 6 rods N. and 5 rods W. of NW. cor. of NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 9.

Photograph by Fred H. McClure, Dec. 6, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 8. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-8. Received March 28, 1914. F. D. Monckton, Clerk.



10. View, looking SW., of cabin of Joseph A. Maxwell, intended to be and probably situated on the NE $\frac{1}{4}$, Sec. 27, T. 4 N., R. 3 W., W.M., about 3 rods N. and 2 rods E. of center of Sec. 27

Photograph by Fred H. McClure, Dec. 10, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 10, Delta, Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Delta, Ex. 270-10. Received March 28, 1914. F. D. Monckton, Clerk.



16. View, looking SE., of cabin of F. S. Wisner, intended to be and probably located upon the NW $\frac{1}{4}$, Sec. 27, T. 4 N., R. 3 W., W.M., about 10 rods N. and 1 rod W. of center of Sec. 27.

Photograph by Fred H. McClure, Dec. 10, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 16. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-16. Received March 28, 1914. F. D. Monckton, Clerk.

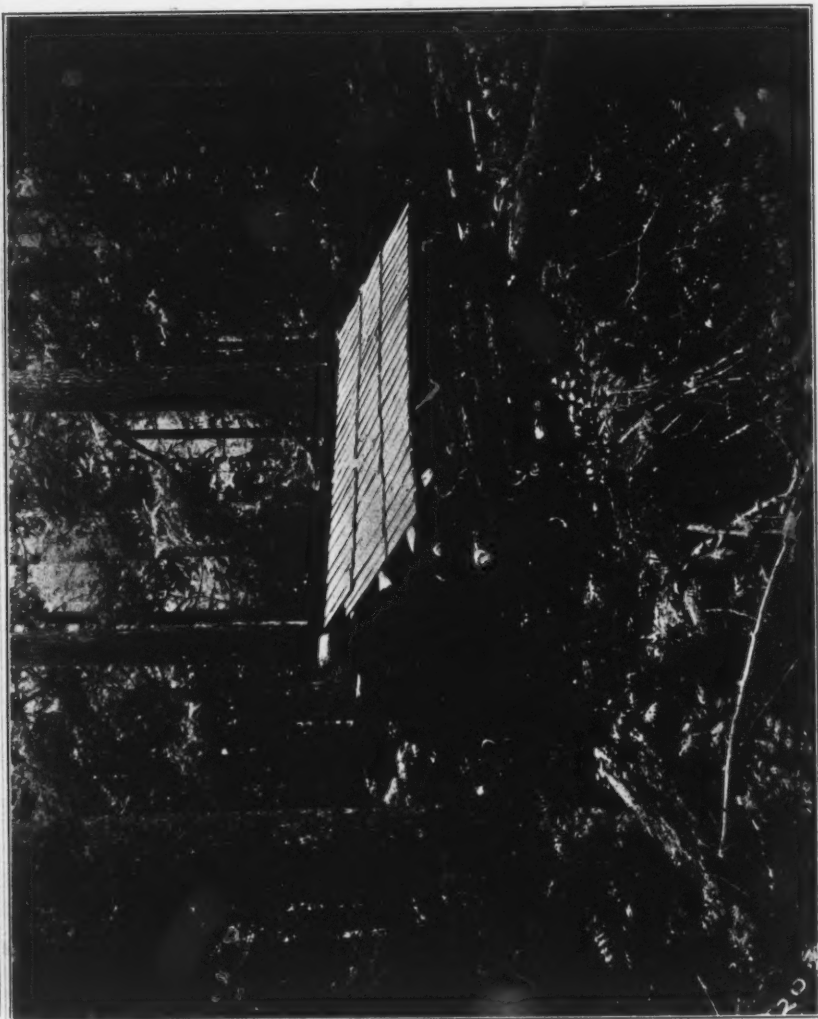


19. View, looking N., of cabin of Fred Witte, on SW1/4, Sec. 25, T. 4 N., R. 3 W., about 10 rods NE. of the SW. cor. of Sec. 25. This is a view of the front of said cabin.

Photograph by Fred H. McClure, Dec. 11, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 19. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-19. Received March 28, 1914. F. D. Monckton, Clerk.

14888



20. View, looking S., of the cabin of Fred Witte, on SW $\frac{1}{4}$, Sec. 25, T. 4 N., R. 3 W., W.M., about 10 rods NE. of the SW. corner of said Sec.

Photograph by Fred H. McClure, Dec. 11, 1907.
(Signed) Ben Irwin.

[Endorsed] No. 20. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270-20, Received March 28, 1914. F. D. Monckton, Clerk.

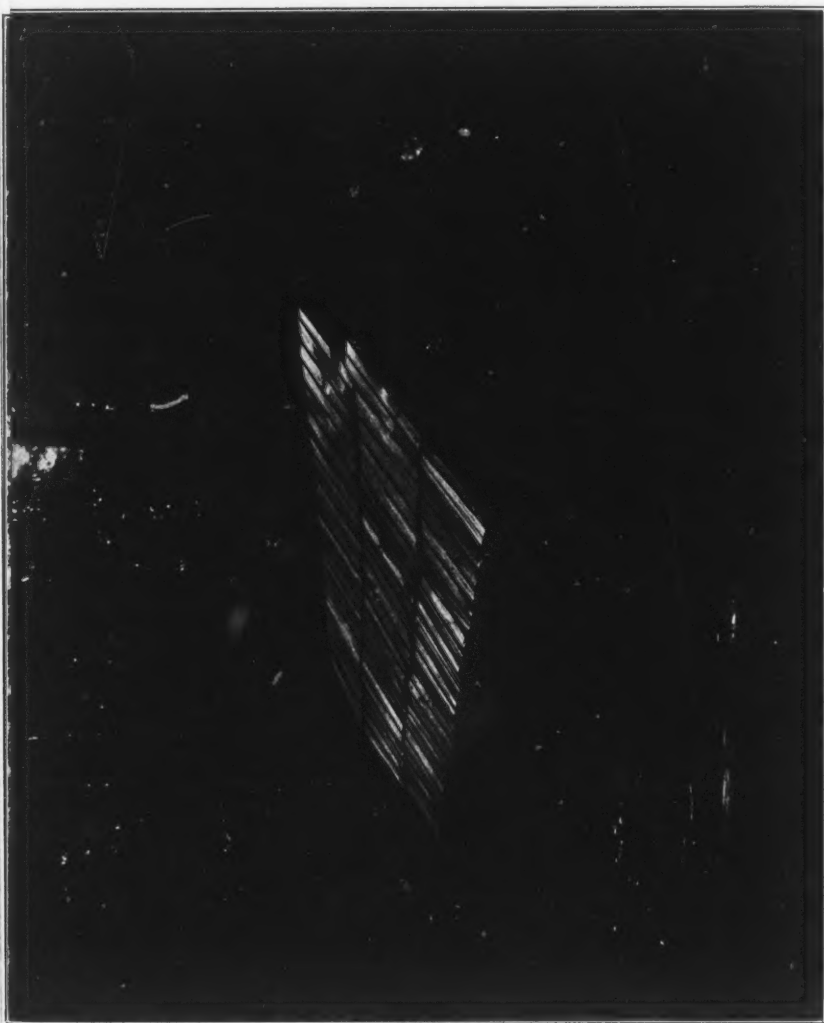
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23. View, looking S., of front of cabin of Albert Arms, on NE $\frac{1}{4}$, Sec. 35, T. 4 N., R. 3 W., W. M., about 30 rods S. and 5 rods W. of NE. cor. of said Section.

Photograph by Fred H. McClure, Dec. 11, 1907.
(Signed) Ben Irwin.

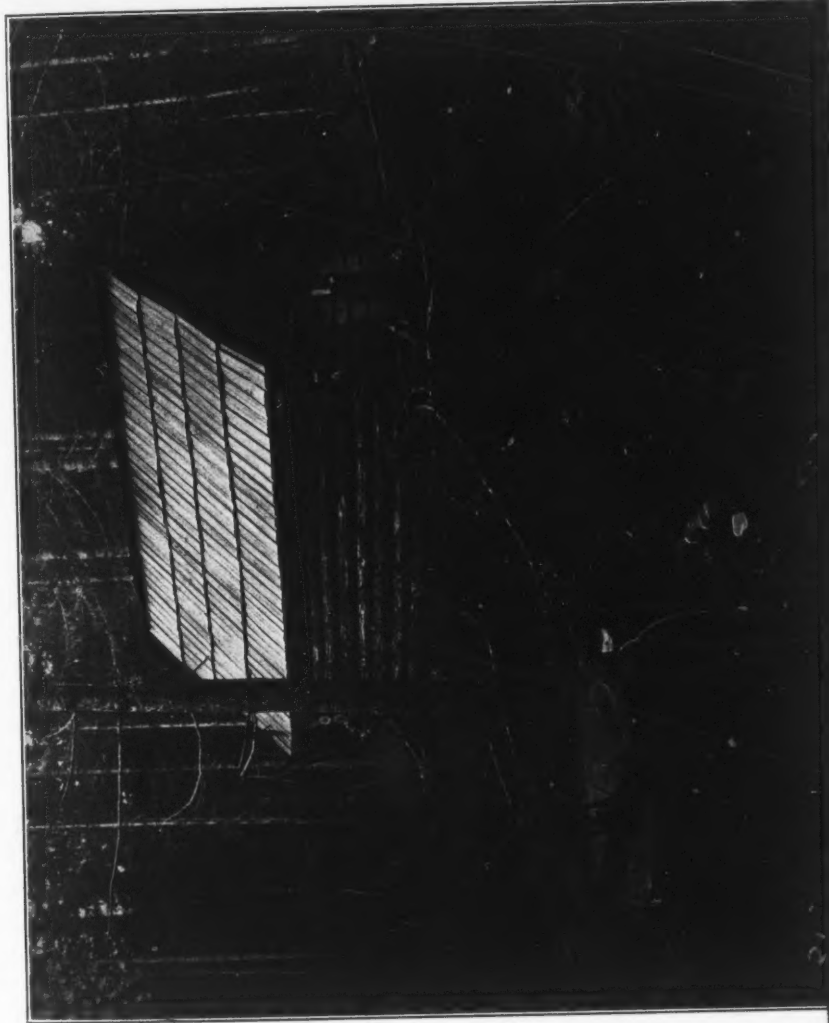
[Endorsed] No. 23. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-23. Received March 28, 1914. F. D. Monckton, Clerk.



24. View, looking N., of rear of cabin of Albert Arms, on NE 1/4 Sec. 35, T. 4 N., R. 3 W., W. M., about 30 rods S. and 5 rods W. of NE. cor. of said Sec. 35.

Photograph by Fred H. McClure, Dec. 11, 1907.
(Signed) Ben Irwin.

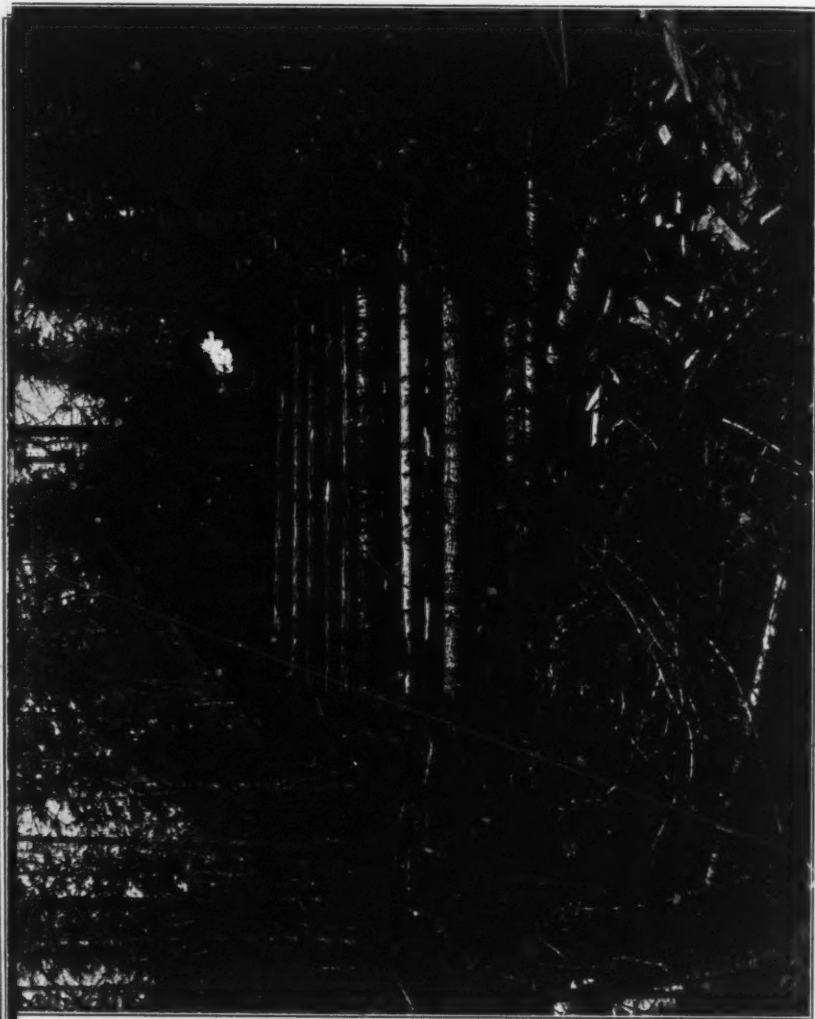
[Endorsed] No. 24. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270-24. Received March 28, 1914. F. D. Monckton, Clerk.



26. View, looking SW., of cabin of W. A. Anderson, on SW $\frac{1}{4}$, Sec. 5, T. 4 N., R. 3 W., W.M., about 15 chs. N. of Qr. cor. on S. line Sec. 5, and nearly on line through middle of section.

Photograph by Fred H. McClure, Jan. 29, 1908.

[Endorsed] No. 26. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270-26. Received March 28, 1914. F. D. Monckton, Clerk.



27. View, looking N., of cabin of W. A. Anderson, on SW $\frac{1}{4}$, Sec. 5, T. 4 N., R. 3 W., W.M., about 15 chs. N. of Qr. cor. on S. line of, and nearly on line through middle of Sec. 5.

Photograph by Fred H. McClure, Jan. 29, 1908.

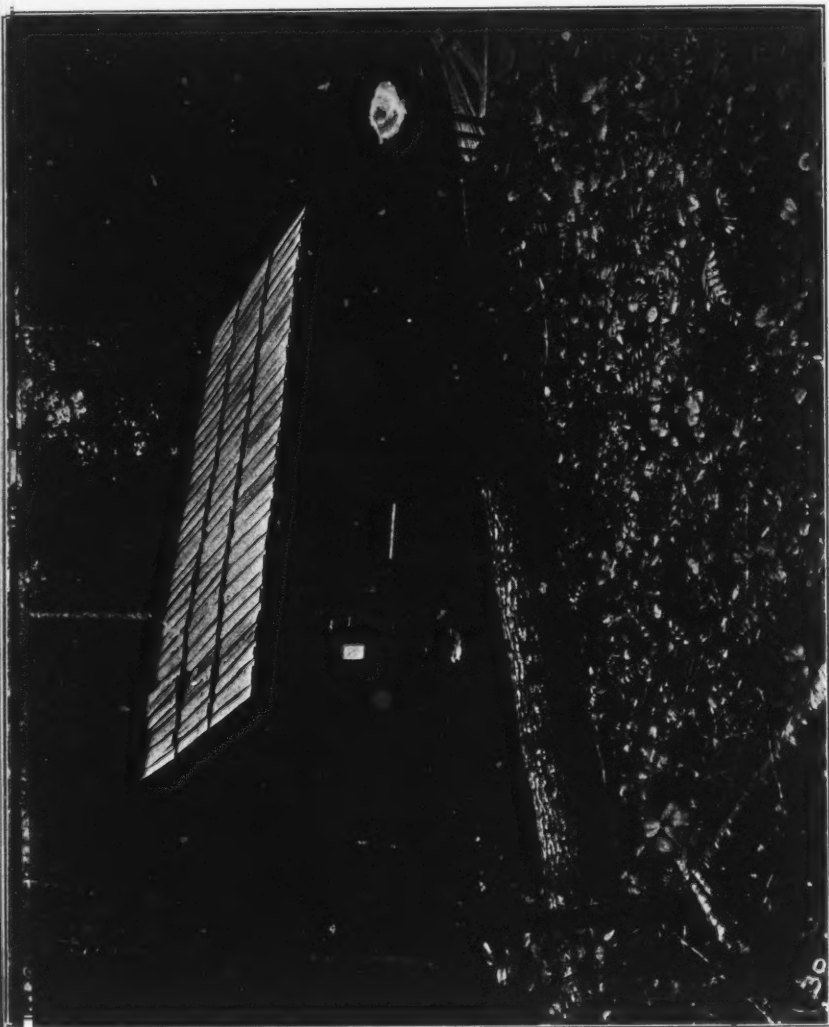
[Endorsed] No. 27. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-27. Received March 28, 1914. F. D. Monckton, Clerk.



29. View, looking S., of front of cabin of W. A. Anderson, on SW $\frac{1}{4}$ Sec. 5, T. 4 N., R. 3 W., W.M., about 15 chs N. of Qr. Cor., and nearly on line through middle of Sec. 5.

Photograph by Fred H. McClure, Jan. 29, 1908.

[Endorsed] No. 29. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-29. Received March 28, 1914. F. D. Monckton, Clerk.



30. View, looking NW., of cabin of W. H. Anderson, on NE $\frac{1}{4}$, Sec. 5, T. 4 N., R. 3 W., W.M., about 5 chs. W., and 15 chs. S. of NE. cor. said Sec.

Photograph by Fred H. McClure, Jan. 29, 1908.

[Endorsed] No. 30. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 270-30. Received March 28, 1914. F. D. Monckton, Clerk.



31. View, looking SW., of cabin of W. H. Anderson, on NE $\frac{1}{4}$, Sec. 5, T. 4 N., R. 3 W., about 15 chs. S. and 5 chs. W. of NE. cor. said Sec.

Photograph by Fred H. McClure, Jan. 29, 1908.

[Endorsed] No. 31. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270-31. Received March 28, 1914. F. D. Monckton, Clerk



33. View, looking S., of front of cabin of O. M. Anderson, on NW $\frac{1}{4}$, Sec. 5, T. 4 N., R. 3 W., W.M., about 15 chs. E. and 15 S. of NW. cor. Sec. 5.

Photograph by Fred H. McClure, Jan. 29, 1908.

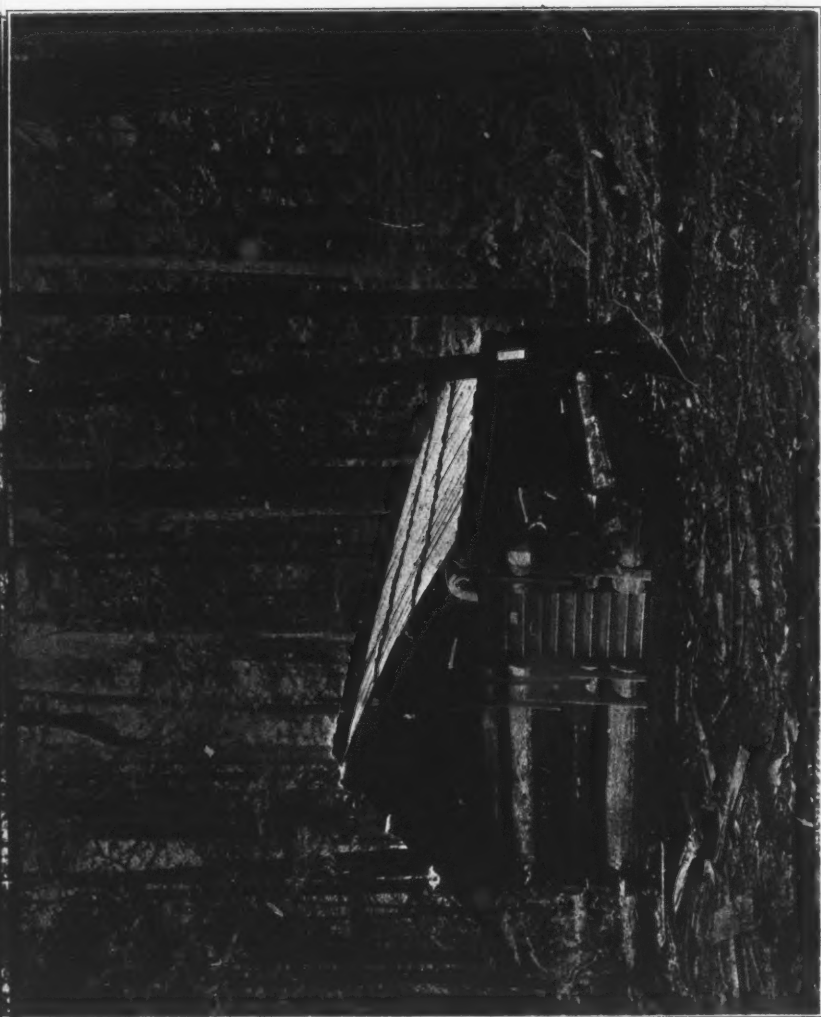
[Endorsed] No. 33. Defts. Ex. 270, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 270-33. Received March 28, 1914. F. D. Monckton, Clerk.



34. View, looking E., of cabin of O. M. Anderson, on NW $\frac{1}{4}$, Sec. 5, T. 4 N., R. 3 W., W.M., about 15 chs. E., and 15 feet S. of NW. cor. Sec. 5.

Photograph by Fred H. McClure, Jan. 29, 1908.

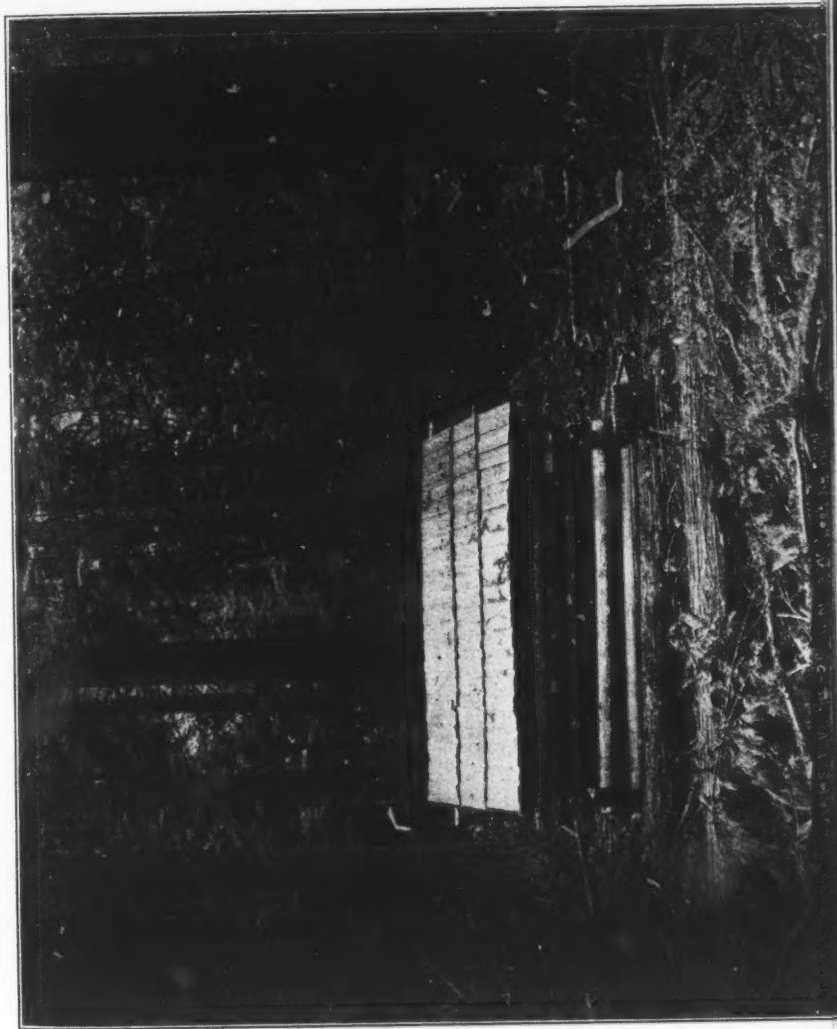
[Endorsed] No. 34, Defts. Ex. 270, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 270-34. Received March 28, 1914. F. D. Monckton, Clerk.



38. Frank Williams,
NW $\frac{1}{4}$ -21-4 N., 3 W.,
looking S.

Photograph by Fred H.
McClure, Feb. 15, 1908.

[Endorsed] No. 38. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-38. Received March
28, 1914. F. D. Monckton, Clerk.



39. Frank Williams,
NW $\frac{1}{4}$ -21-4 N., 3 W.,
looking NW.

Photograph by Fred H.
McClure, Feb. 15, 1908.

[Endorsed] No. 39. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-39. Received March
28, 1914. F. D. Monekton, Clerk.



41. Paul Birkenfield,
SE $\frac{1}{4}$ -15-4 N., 3 W., look-
ing N.

Photograph by Fred H.
McClure, Feb. 15, 1907.

[Endorsed] No. 41. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-41. Received March
28, 1914. F. D. Monekton, Clerk.

PAUL BIRKENFIELD, SE $\frac{1}{4}$ -15-4 N., 3 W., looking N.

42. Paul Birkenfield,
SE $\frac{1}{4}$ -15-4 N., 3 W., look-
ing W.

Photograph by Fred H.
McClure, Feb. 15, 1907.

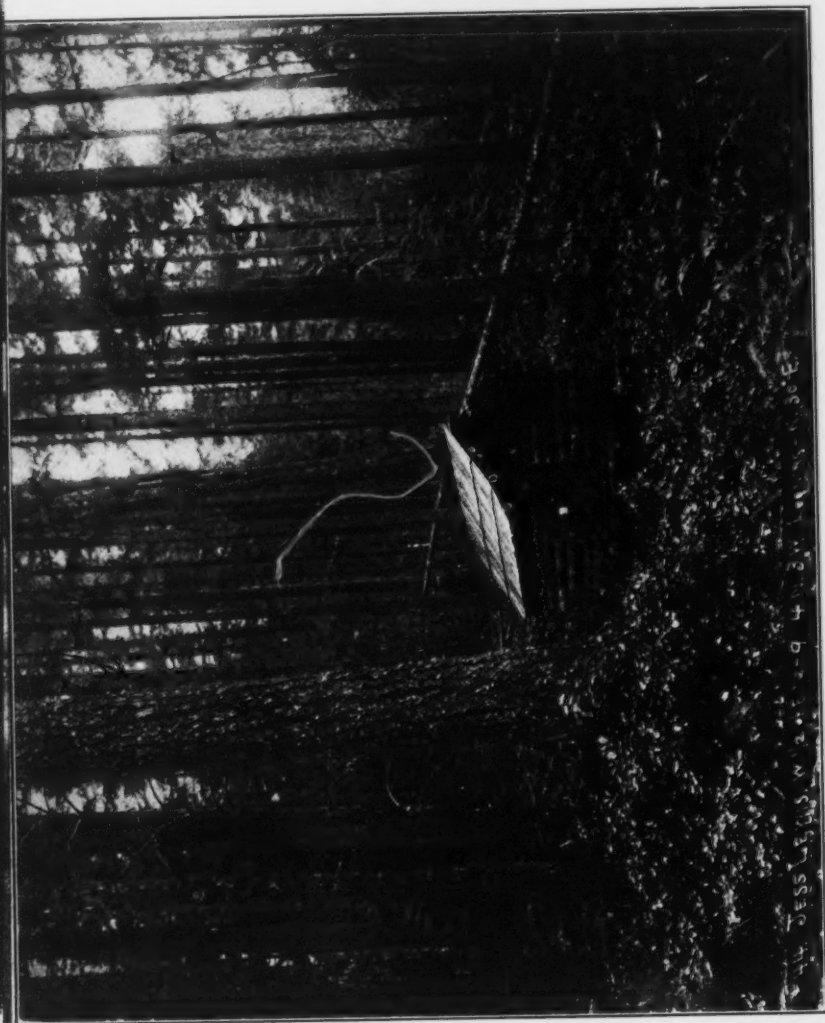
[Endorsed] No. 42, Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-42. Received March
28, 1914. F. D. Monckton, Clerk.



44. Jess Lewis, W $\frac{1}{2}$
of E $1\frac{1}{2}$ -9-4 N., 3 W., look-
ing N. 30° E.

Photograph by Fred H.
McClure, Feb. 14, 1908.

[Endorsed] No. 44. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-44. Received March
28, 1914. F. D. Monckton, Clerk.





45. Jess Lewis, $W\frac{1}{2}$ of $E\frac{1}{2}$ -9-4 N., 3 W., looking N. 10° W.

Photograph by Fred H. McClure, Feb. 14-16, 1908.

[Endorsed] No. 45. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defs. Ex. 270-45. Received March 28, 1914. F. D. Monckton, Clerk.



47. E. C. Lake, NE $\frac{1}{4}$
Sec. 35-T. 20 S., R. 1 W.,
Look. S. W.

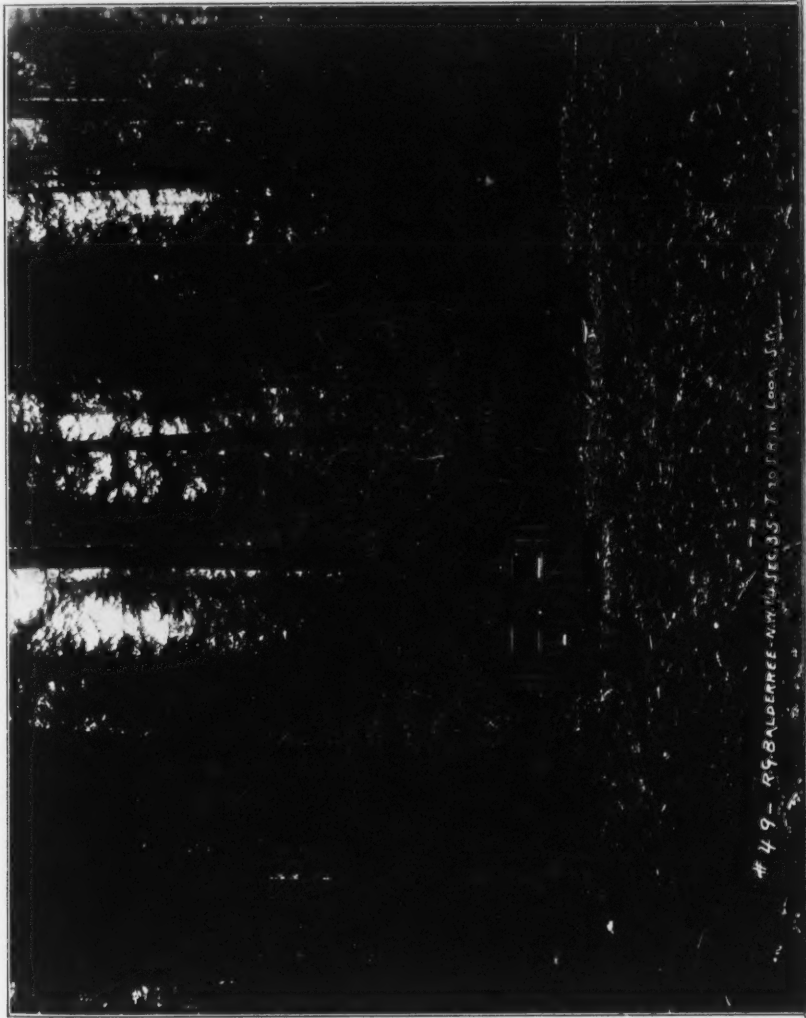
Photograph by Fred H.
McClure, May 13, 1908.

[Endorsed] No. 47, Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-47. Received March
28, 1914. F. D. Monckton, Clerk.

49. R. G. Balderree,
NW $\frac{1}{4}$ Sec. 35, T. 20 S.,
R. 1 W., Look. S. W.

Photograph by Fred H.
McClure, May 13, 1908.

[Endorsed] No. 49, Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-49. Received March
28, 1914. F. D. Monckton, Clerk.

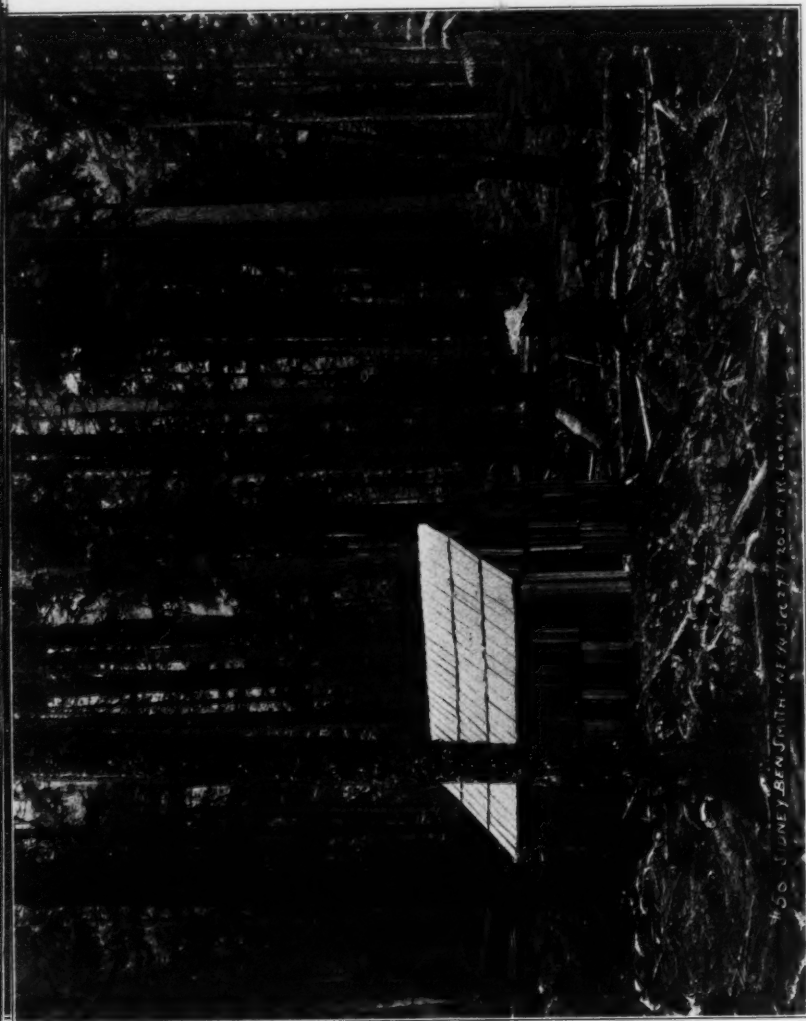


49 - R. G. BALDERREE - NW $\frac{1}{4}$ SEC. 35 - T. 20 S. R. 1 W. Look. S. W.

50. Sidney Ben Smith,
NE $\frac{1}{4}$ Sec. 27-T. 20 S., R.
1 W., Look. N. W.

Photograph by Fred H.
McClure, May 14, 1907.

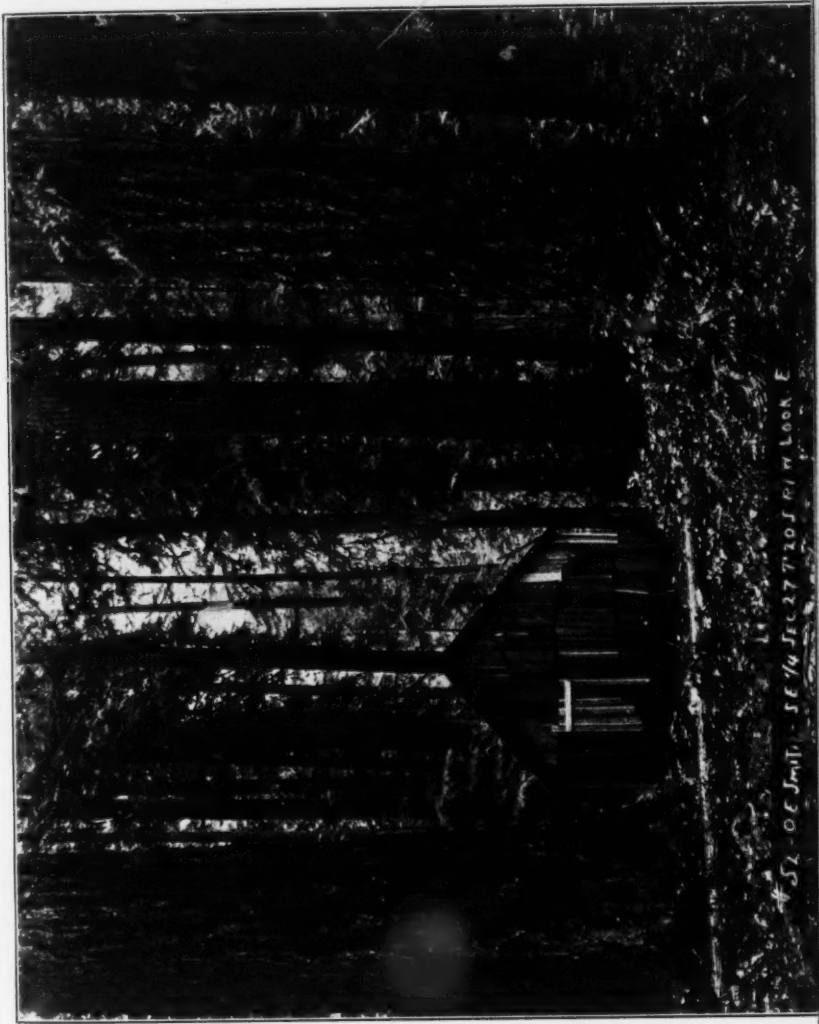
[Endorsed] No. 50. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-50. Received March
28, 1914. F. D. Monckton, Clerk.



52. O. E. Smith, SE $\frac{1}{4}$
Sec. 27, T. 20 S., R. 1 W.,
Look, E.

Photograph by Fred H.
McClure, May 14, 1908.

[Endorsed] No. 52. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-52, Received March
28, 1914. F. D. Monckton, Clerk.



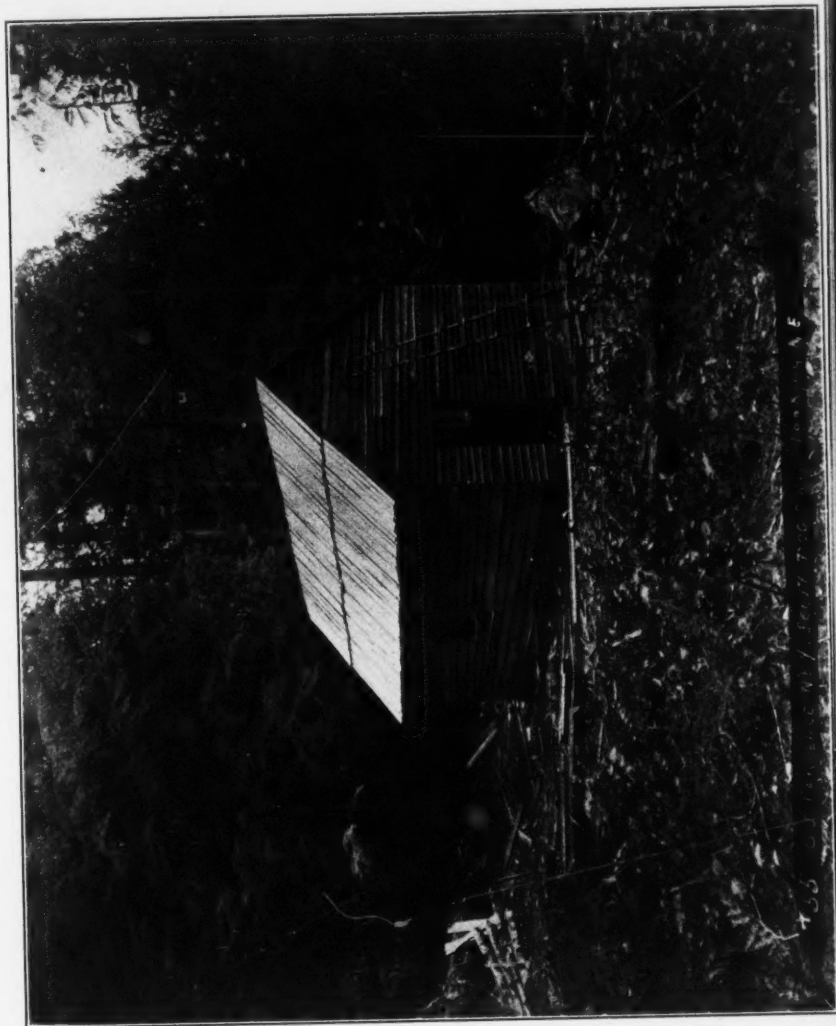
#52 - O.E. Smith, SE $\frac{1}{4}$ Sec. 27 T. 20 S. R. 1 W. Look E.

54. O. J. Lawrence,
NE $\frac{1}{4}$ Sec. 17, T. 20 S.,
R. 1 W. Look. N.

Photograph by Fred H.
McClure, May 15, 1908.

[Endorsed] No. 54. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-54. Received March
28, 1914. F. D. Monckton, Clerk.





55. O. J. Lawrence,
NE $\frac{1}{4}$ Sec. 17, T. 20 S., R.
1 W. Looking NE.

Photograph by Fred H.
McClure, May 15, 1908.

[Endorsed] No. 55. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-55. Received March
28, 1914. F. D. Monckton, Clerk.



62. Enos Fluhner,
SE $\frac{1}{4}$ Sec. 31-5 N. 2 W.,
Look. S. W.

Photograph by Fred H.
McClure, Sept. 28, 1908.

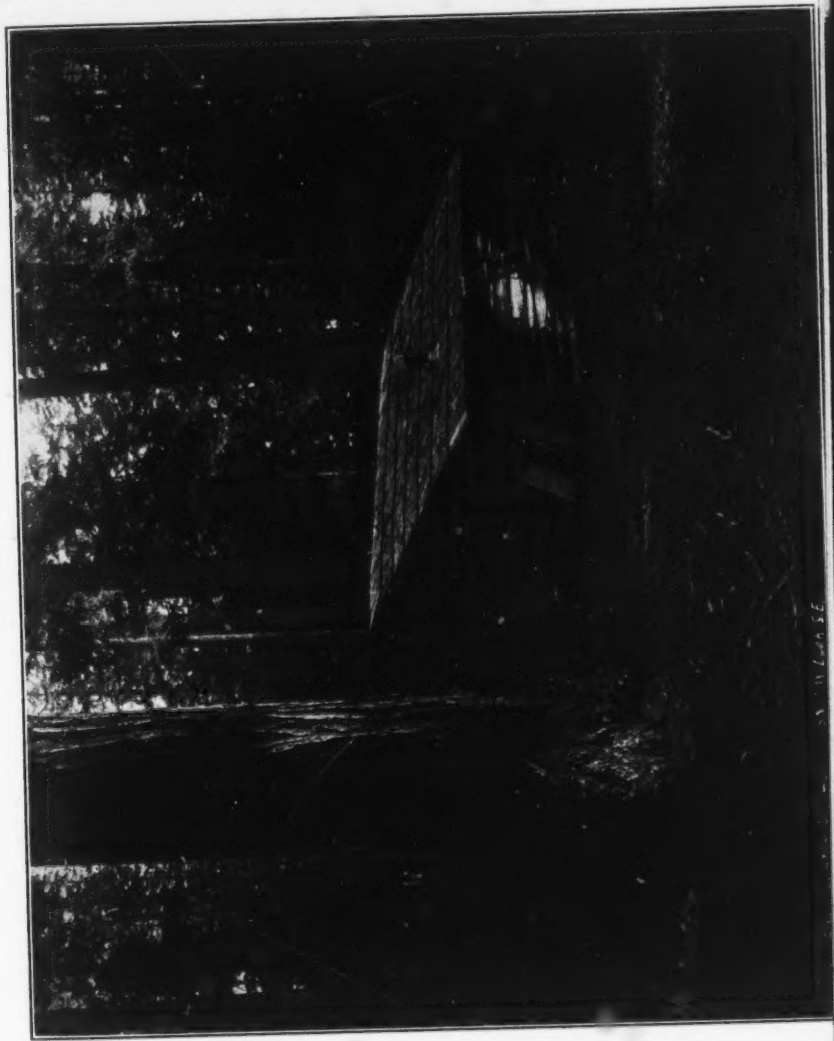
[Endorsed] No. 62. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-62, Received March
28, 1914. F. D. Monckton, Clerk.

2. vol 62. 4478 - 52 up Sec 31-5 N. 2 W. Look SW

63. Enos Fluhrer,
SE $\frac{1}{4}$ Sec. 31-5 N., 2 W.,
Look. S. E.

Photograph by Fred H.
McClure, Sept. 28, 1908.

[Endorsed] No. 63. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-63. Received March
28, 1914. F. D. Monckton, Clerk.



65. S. Shryock, SW $\frac{1}{4}$
Sec. 21-4 N., 3 W., Look
W.

Photograph by Fred H.
McClure, Sept 29, 1908.

[Endorsed] No. 65. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-65. Received March
28, 1914. F. D. Monekton, Clerk.



66. S. Shryock, SW $\frac{1}{4}$
Sec. 21-4 N., 3 W., Look
S.

Photograph by Fred H.
McClure, Sept. 29, 1908.

[Endorsed] No. 66. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-66. Received March
28, 1914. F. D. Monckton, Clerk.

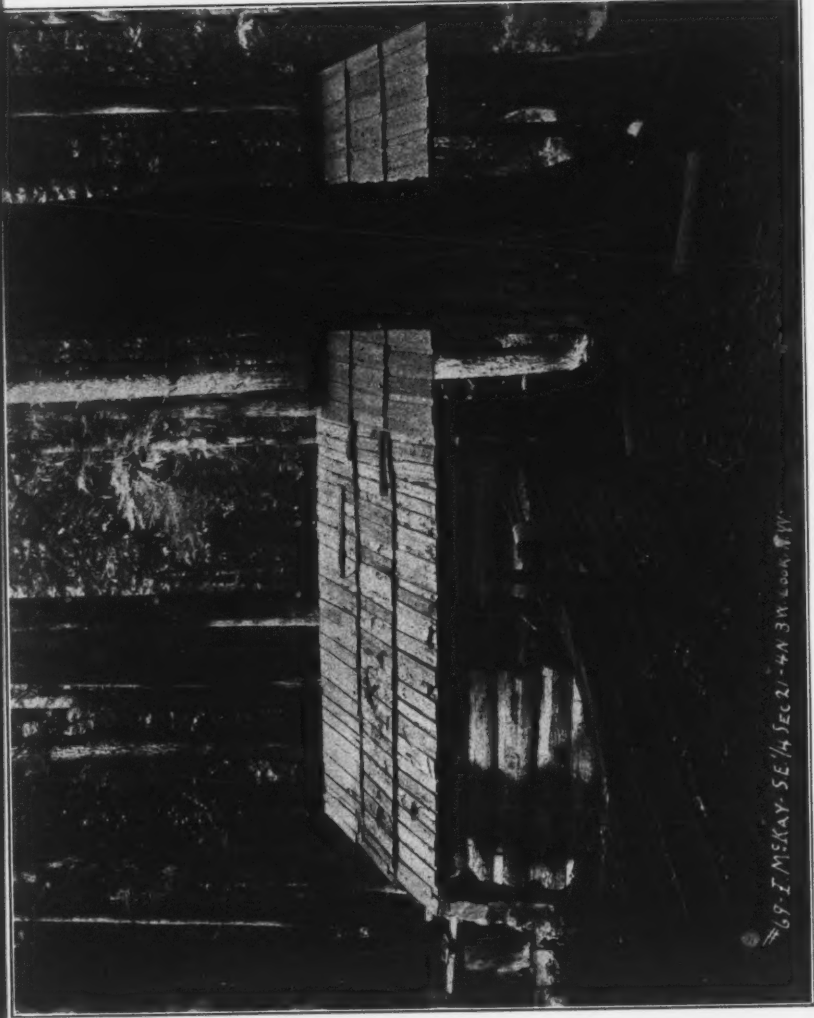


#66-S. SHRYOCK-SW $\frac{1}{4}$ SEC. 21-4 N. 3 W. LOOK S.

69. I. McKay, SE 1/4
Sec. 21-4 N., 3 W., Look.
NW.

Photograph by Fred H.
McClure, Sept. 29, 1908.

[Endorsed] No. 69. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-69. Received March
28, 1914. F. D. Monckton, Clerk.



69-I-McKAY-SE 1/4 SEC 21-4N 3W LOOK NW

70. I. McKay, SE $\frac{1}{4}$,
Sec. 21.4 N., 3 W., Look.
S. 10° E.

Photograph by Fred H.
McClure, Sept. 29, 1908.

[Endorsed] No. 70. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-70. Received March
28, 1914. F. D. Monckton, Clerk.



70. I. McKay, SE $\frac{1}{4}$, Sec. 21.4 N., 3 W., Look. S. 10° E.

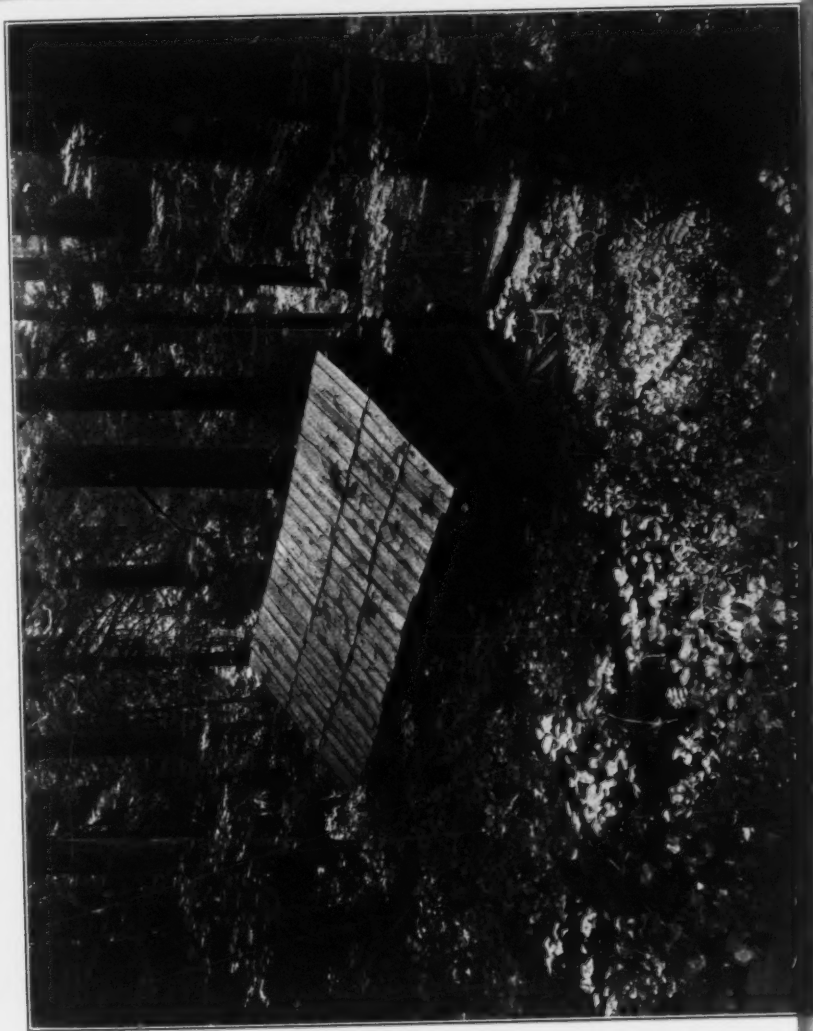
72. J. R. Peterson,
NE $\frac{1}{4}$ Sec. 21-4 N., 3 W.,
Look, SE.

Photograph by Fred H.
McClure, Sept. 29, 1908.

[Endorsed] No. 72. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-72. Received March
28, 1914. F. D. Monckton, Clerk.



72-JR PETERSON-NE 1/4 SEC 21-4 N 3W Look SE



73. J. R. Peterson,
NE $\frac{1}{4}$ Sec. 21-4 N., 3 W.,
Look. S.

Photograph by Fred H.
McClure, Sept. 29, 1908.

[Endorsed] No. 73. Defts. Ex.
270. Case No. 2400.—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270/73. Received March
28, 1914. F. D. Monckton, Clerk.

74. Fred Floeter,
NE 1/4-19-4 N., 3 W.,
Look. N.

Photograph by Fred H.
McClure, Sept. 30, 1908.

[Endorsed] No. 74. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-74. Received March
28, 1914. F. D. Monckton, Clerk.

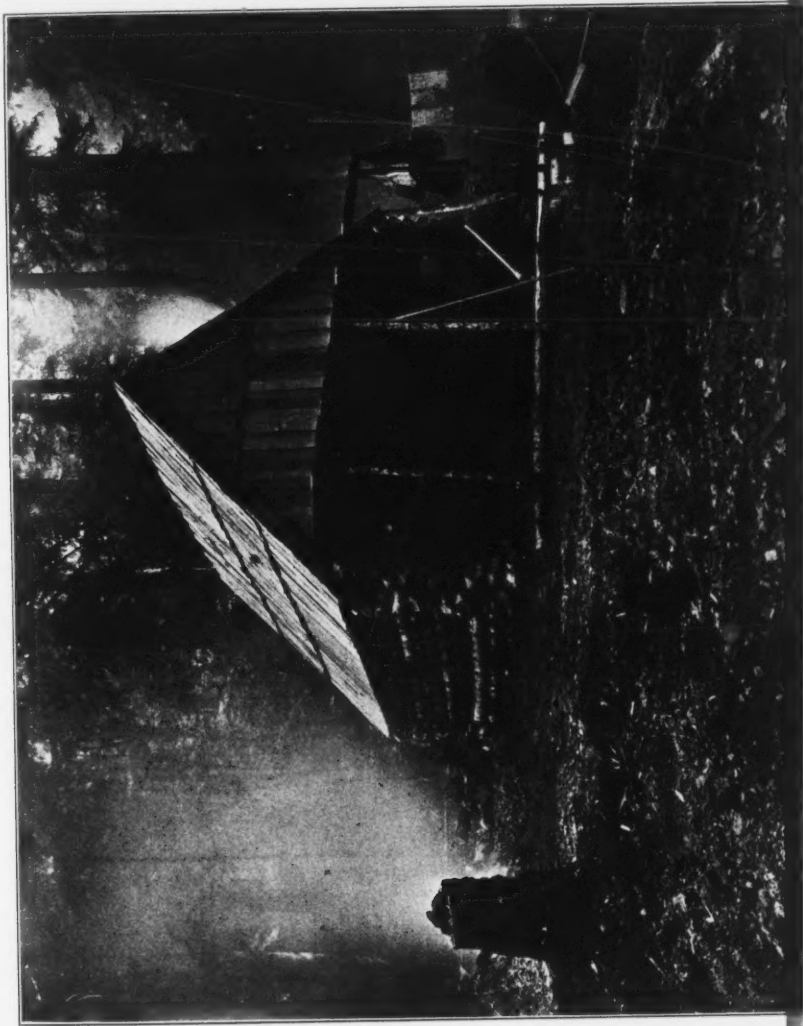


74. Fred Floeter NE 1/4-19-4 N. 3 W.

75. Fred Floeter,
NE $\frac{1}{4}$ Sec. 19, 4 N., 3 W.,
Look. S.

Photograph by Fred H.
McClure, Sept. 30, 1908.

[Endorsed] No. 75. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-25. Received March
28, 1914. F. D. Monckton, Clerk.



77. V. V. MacAboy,
NE 1/4 Sec. 7-4 N., 3 W.,
Look. S. E.

Photograph by Fred H.
McClure, Oct. 1, 1908.

[Endorsed] No. 77. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-77. Received March
28, 1914. F. D. Monekton, Clerk.



777-VV MacAboy-NE 1/4 Sec 7-4 N. 3 W. Look SE

78. V. V. MacAboy,
NE $\frac{1}{4}$ Sec. 7-4 N., 3 W.,
Look. S. W.

Photograph by Fred H.
McClure, Oct. 1, 1908.

[Endorsed] No. 78. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-78. Received March
28, 1914. F. D. Monckton, Clerk.



80. E. L. MacLafferty,
NE $\frac{1}{4}$ Sec. 1-3 N., 3 W.,
Look. N. E.

Photograph by Fred H.
McClure, Oct. 3, 1908.

[Endorsed] No. 80. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-80, Received March
28, 1914. F. D. Monckton, Clerk.



80. E. L. MACLAFFERTY-NE $\frac{1}{4}$ Sec. 1-3 N. 3 W. Look. N. E.

81. E. L. MacLafferty,
NE $\frac{1}{4}$ Sec. 1-3 N., 3 W.,
Look. E.

Photograph by Fred H.
McClure, Oct. 3, 1908.

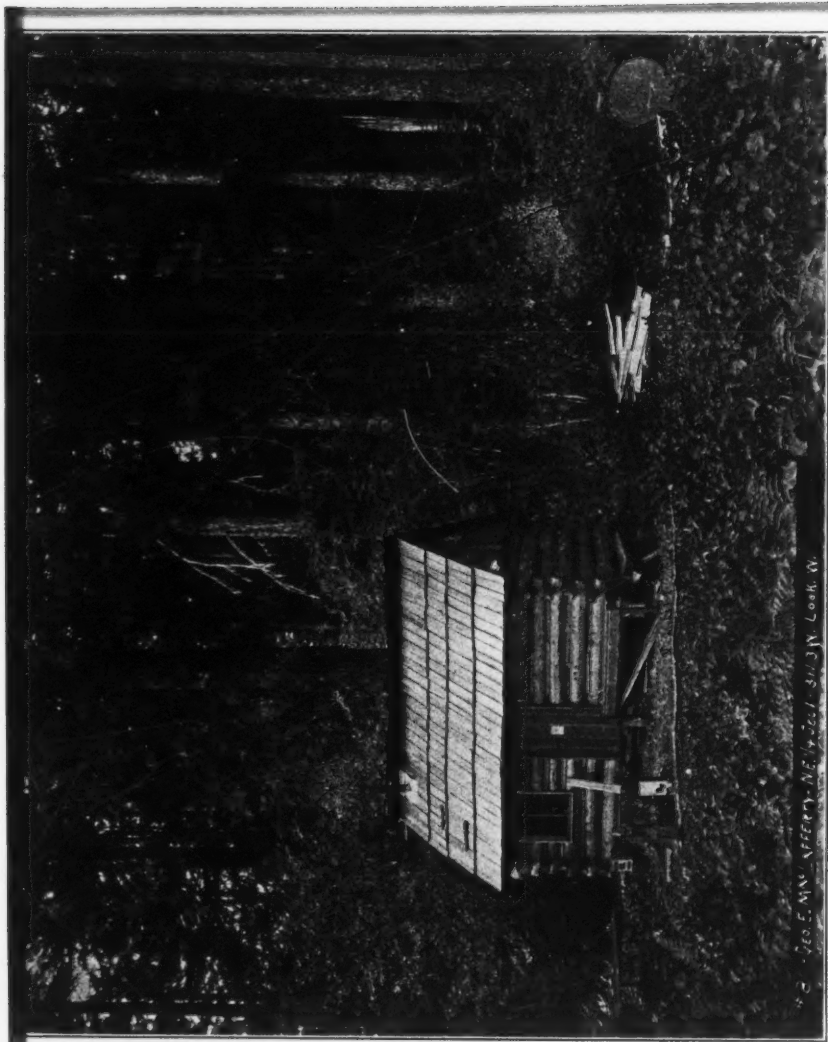
[Endorsed] No. 81. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-81. Received March
28, 1914. F. D. Monckton, Clerk.



82, Geo. E. MacLaf-
ferty, NE $\frac{1}{4}$ Sec. 1-3 N.,
3 W., Look. W.

Photograph by Fred H.
McClure, Oct. 3, 1908.

[Endorsed] No. 82, Defts. Ex.
270, Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-82. Received March
28, 1914. F. D. Monckton, Clerk.



82 Geo. E. MacLafferty, NE $\frac{1}{4}$ Sec. 1-3 N., 3 W., Look. W.



83. Geo. E. MacLafferty, NE $\frac{1}{4}$ Sec. 1-3 N., 3 W., Look. E.

Photograph by Fred H. McClure, Oct. 3, 1908.

[Endorsed] No. 83. Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270-83. Received March 28, 1914. F. D. Monckton, Clerk.

85. B. N. MacLafferty,
SE $\frac{1}{4}$ Sec. 1, 3 N., 3 W.,
Look. N. W.

Photograph by Fred H.
McClure, Oct. 3, 1908.

[Endorsed] No. 85. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-85, Received March
28, 1914. F. D. Monckton, Clerk.

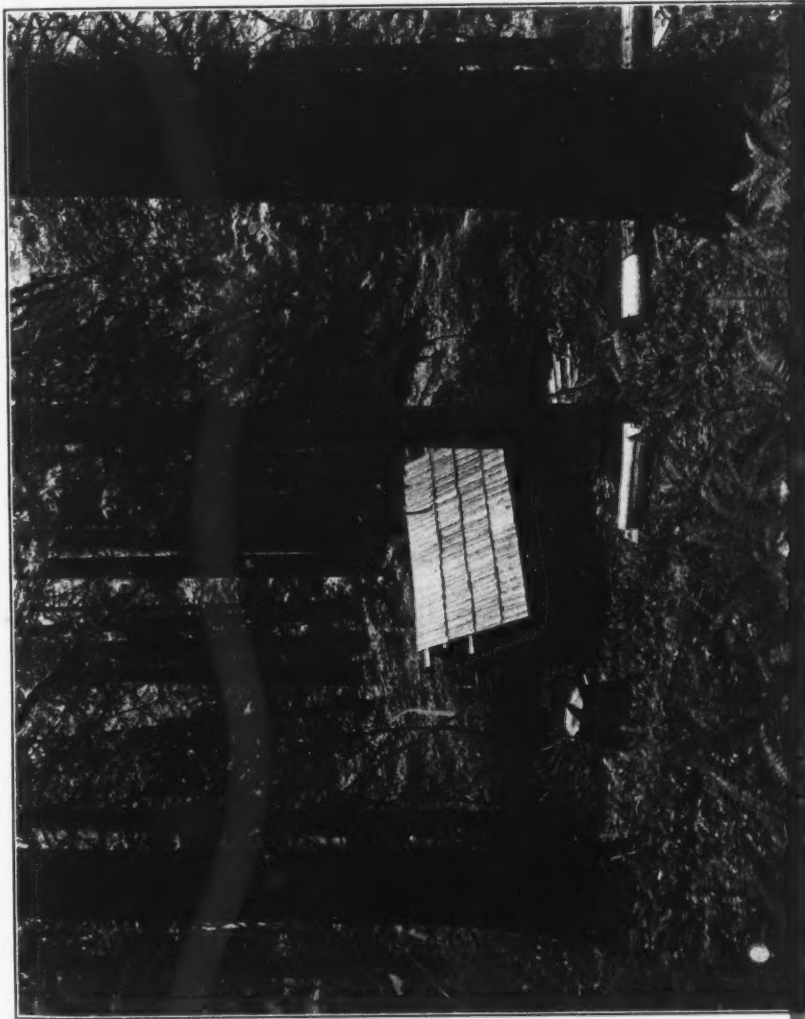


435-51 N. W. Sec. 1, 3 N. 3 W. Look. N. W.

86. B. N. MacLafferty,
SE $\frac{1}{4}$ Sec. 1-3 N., 3 W.,
Look. N. E.

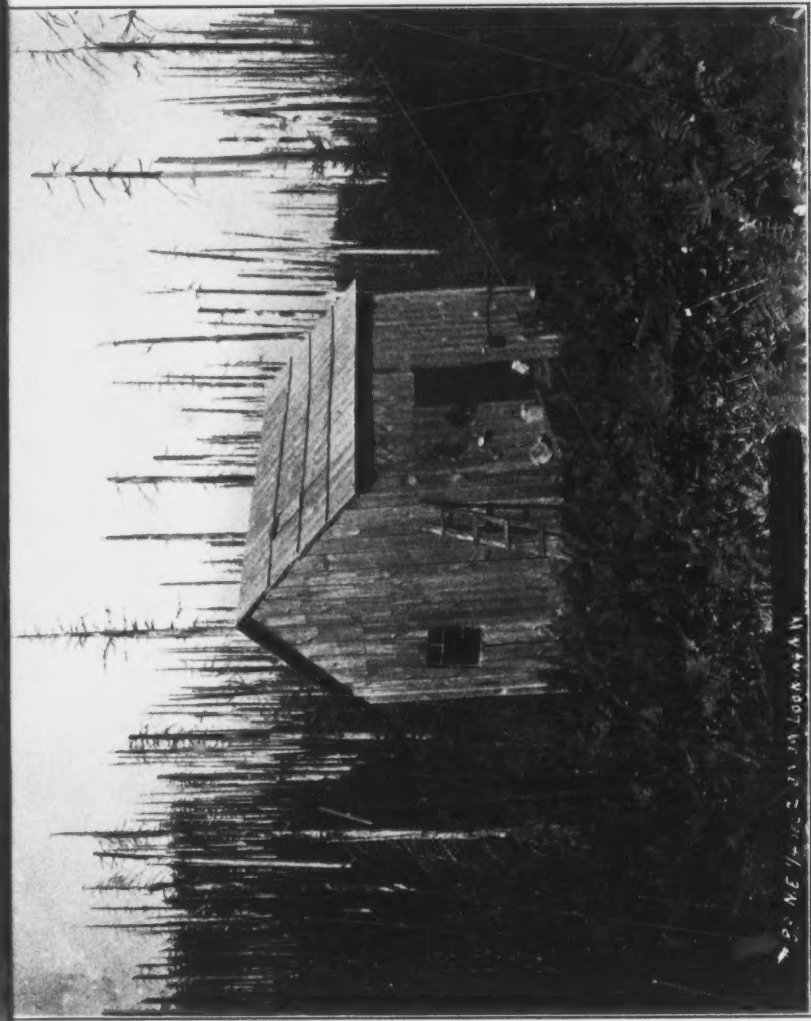
Photograph by Fred H.
McClure, Oct. 3, 1908.

[Endorsed] No. 86. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-86, Received March
28, 1914. F. D. Monckton, Clerk.

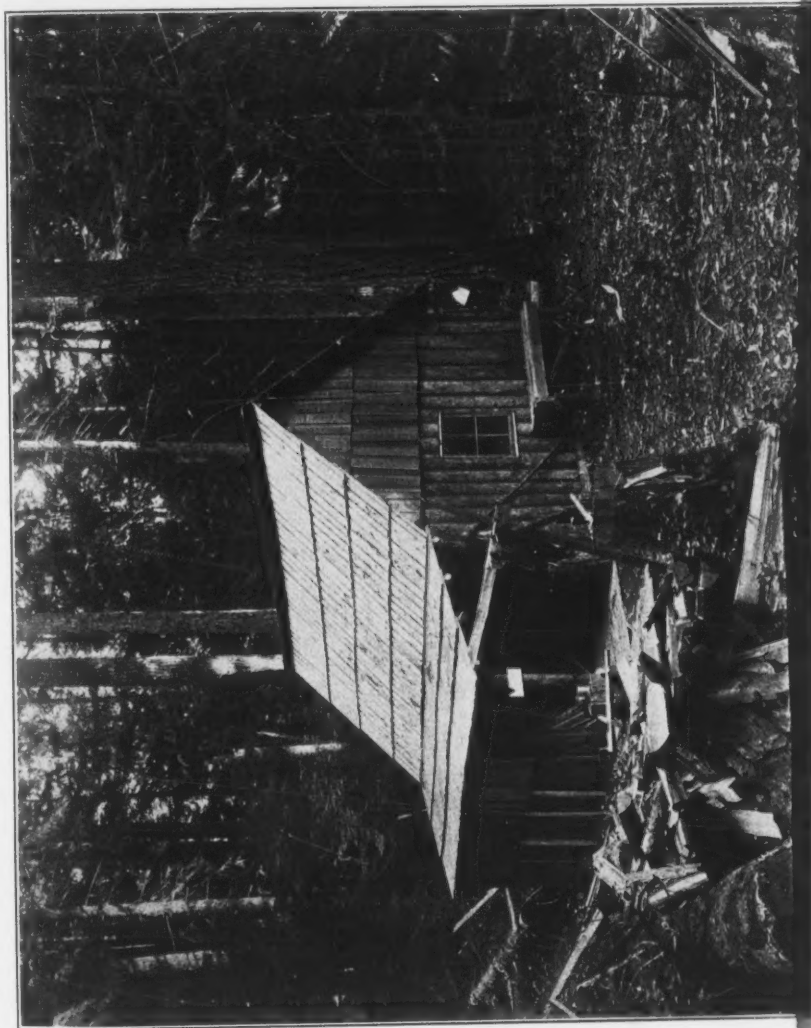


88. NE $\frac{1}{4}$ Sec. 2-3 N.,
3 W., Looking N. W.

[Endorsed] No. 88, Defts. Ex.
270, Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-88. Received March
28, 1914. F. D. Monckton, Clerk.



NE $\frac{1}{4}$ SEC. 2-3 N. LOOKING NW



89. Edgar MacLafferty, SE $\frac{1}{4}$ Sec. 25-4 N., 3 W., Look. S. 55° E.

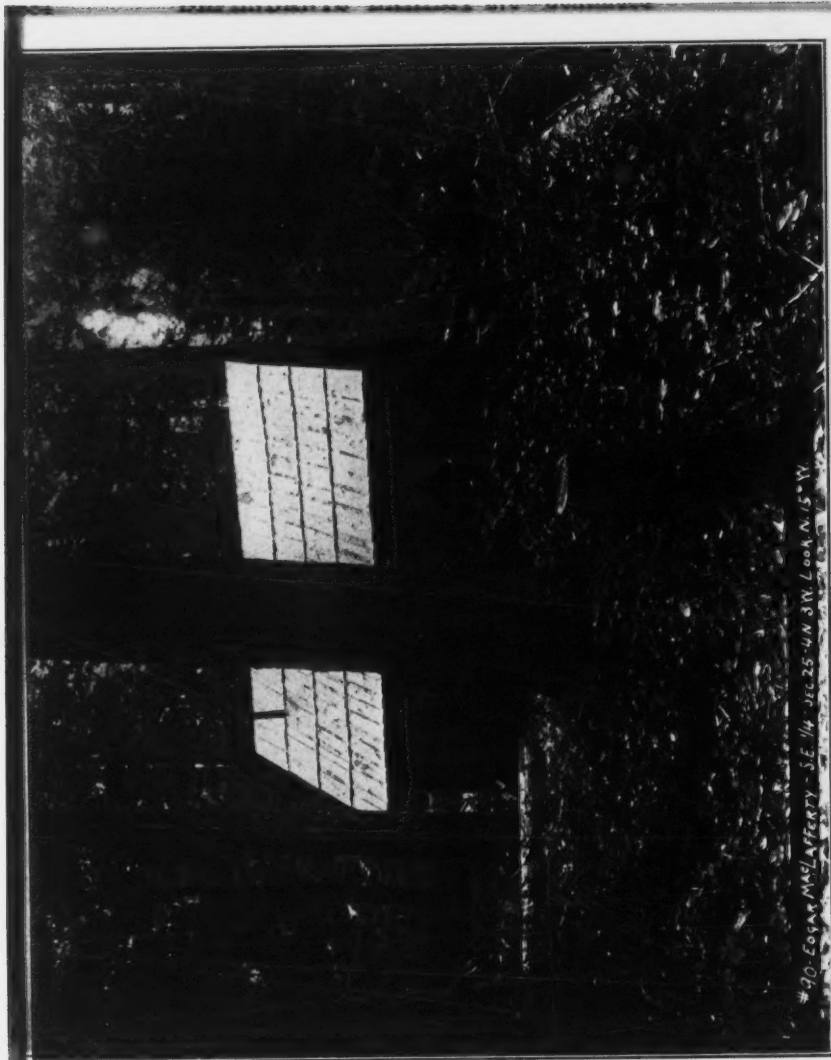
Photograph by Fred H. McClure, Oct. 4, 1908.

[Endorsed] No. 89. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-89. Received March 28, 1914. F. D. Monckton, Clerk.

90. Edgar MacLafferty, SE $\frac{1}{4}$ Sec. 25—4 N., 3 W., Look. N. 15° W.

Photograph by Fred H. McClure, Oct. 4, 1908.

[Endorsed] No. 90. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 270-90. Received March 28, 1914. F. D. Monckton, Clerk.



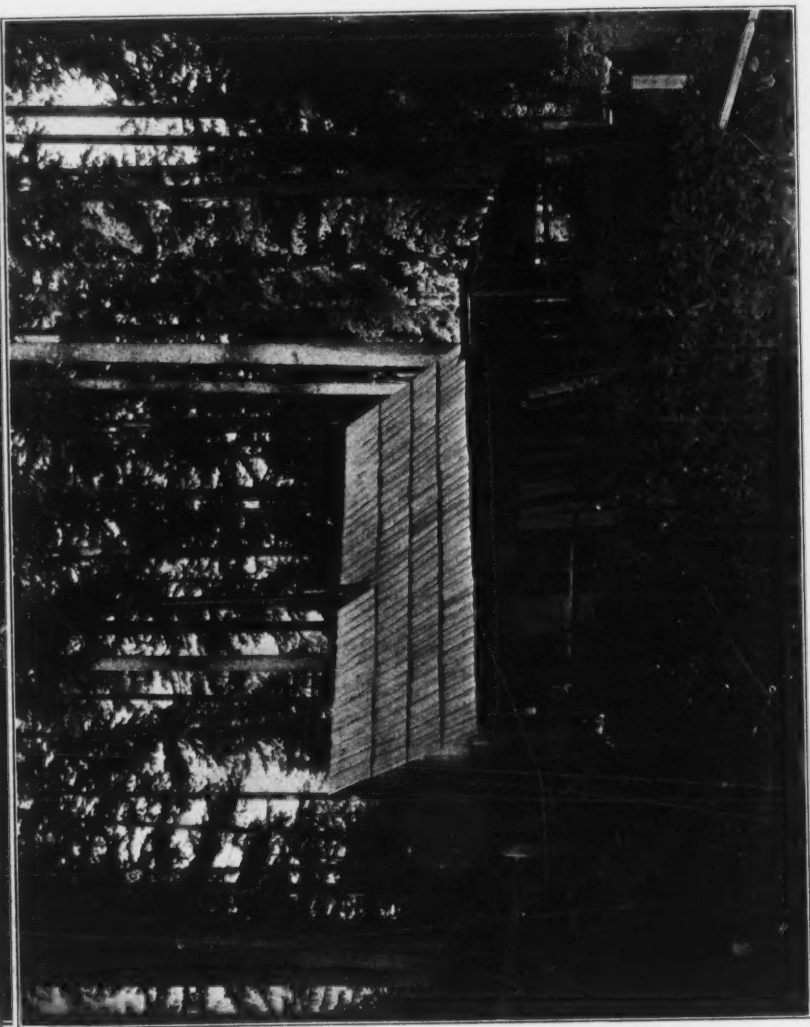
#90-Edgar MacLafferty SE $\frac{1}{4}$ Sec 25-4N 3W Look N 15° W



91. D. MacLafferty,
NE¼ Sec. 25-4 N., 3 W.,
Look. East.

Photograph by Fred H.
McClure, Oct. 4, 1908.

[Endorsed] No. 91. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defs. Ex. 270-91. Received March
28, 1914. F. D. Monckton, Clerk.



92. D. MacLafferty,
NE $\frac{1}{4}$ Sec. 25-4 N., 3 W.,
Looking N. E.

Photograph by Fred H.
McClure, Oct. 4, 1908.

[Endorsed] No. 92. Defia. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defia. Ex. 270-92. Received March
28, 1914. F. D. Monckton, Clerk.



93. Geo. C. MacLafferty, NW $\frac{1}{4}$ D 25-4 N., 3 W., Looking SW.

Photograph by Fred H. McClure, Oct. 31, 1908.

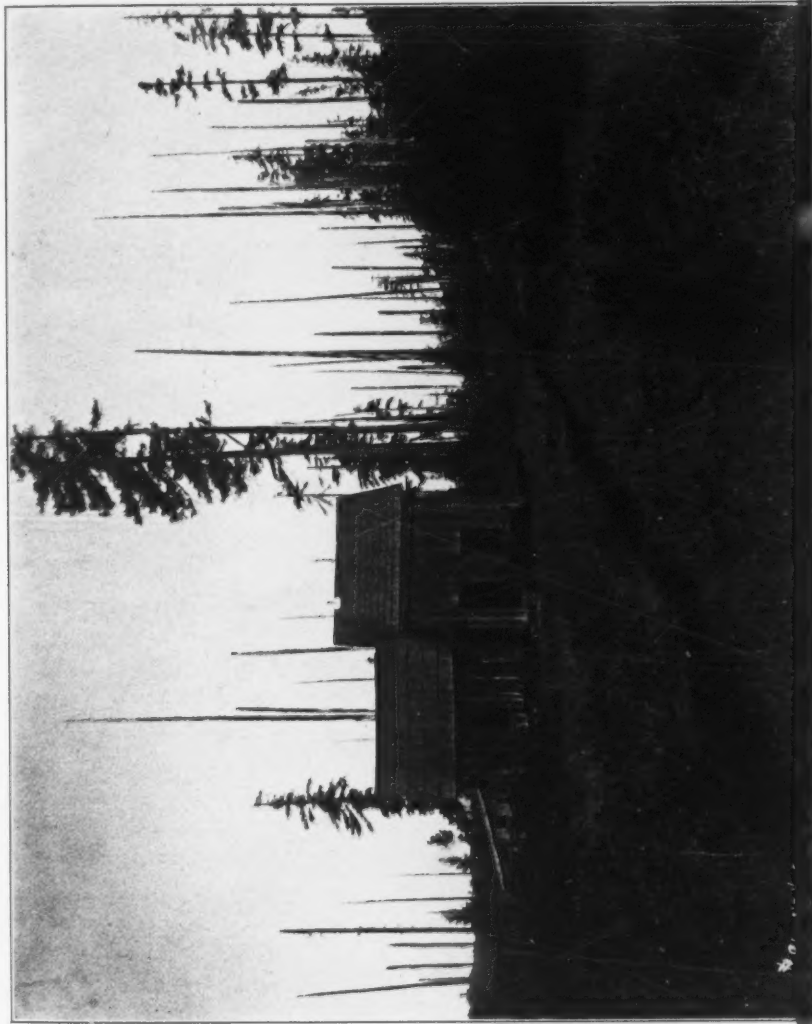
[Endorsed] No. 93. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-93. Received March 28, 1914. F. D. Monckton, Clerk.



94. Geo. C. MacLafferty, NW $\frac{1}{4}$ Sec. 25-4 N., 3 W., Looking W.

Photograph by Fred H. McClure, Oct. 3, 1908.

[Endorsed] No. 94. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 270-94. Received March 28, 1914. F. D. Monckton, Clerk.



No. 96. NE $\frac{1}{4}$ Sec. 10-
3 N., 3 W., Look. W.

[Endorsed] No. 96. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-96. Received March
28, 1914. F. D. Monckton, Clerk.

97. C. W. Mead, SE $\frac{1}{4}$ -
3-1 S. 5 E., Looking N.
W.

Photograph by Fred H.
McClure, Nov. 10, 1908.

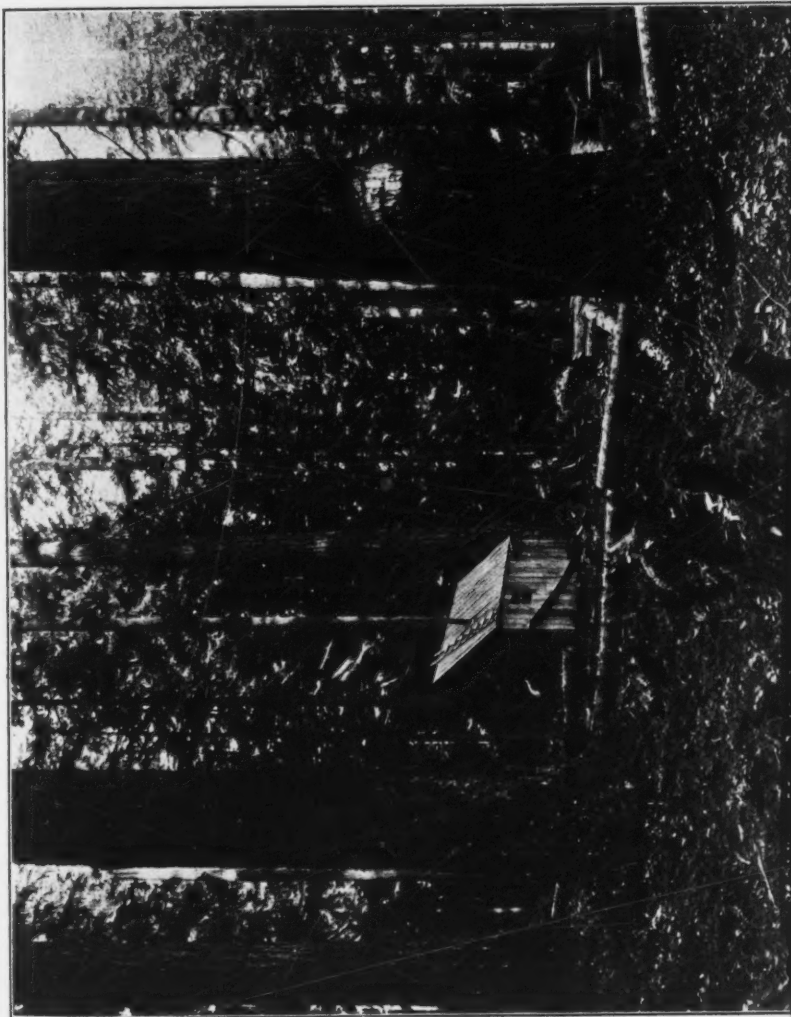
[Endorsed] No. 97. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-97. Received March
28, 1914. F. D. Monckton, Clerk.



98. C. W. Mead, SE $\frac{1}{4}$ -
3-1 S., 5 E., Looking N.
E.

Photograph by Fred H.
McClure, Nov. 10, 1908.

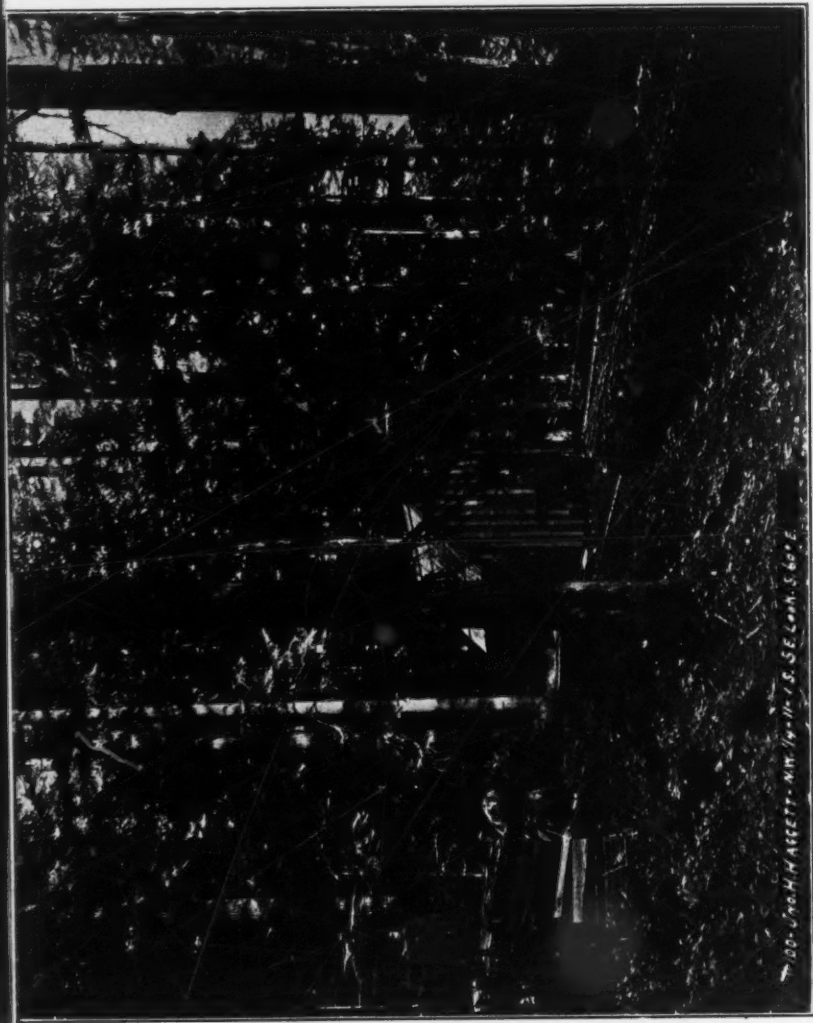
[Endorsed] No. 98. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-98. Received March
28, 1914. F. D. Monckton, Clerk.



100. Jno. H. Haggett,
NW $\frac{1}{4}$ -11-1 S. 5 E., Look.
S. 60° E.

Photograph by Fred H.
McClure, Nov. 10, 1908.

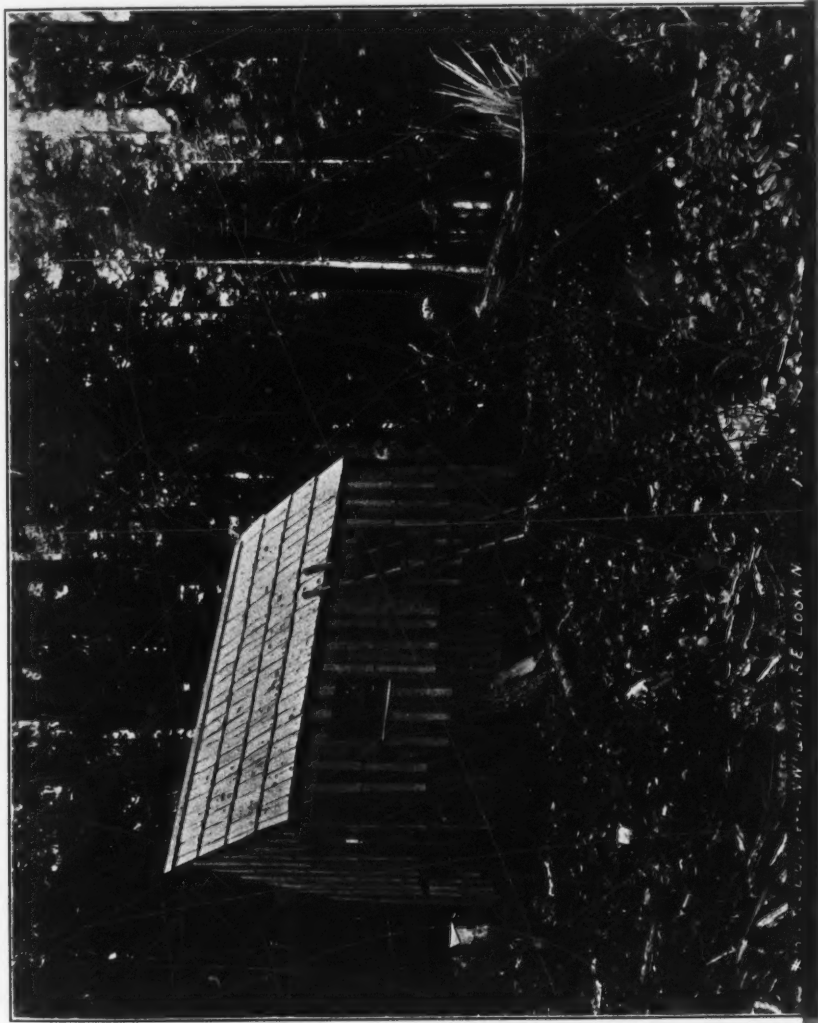
[Endorsed] No. 100. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-100. Received March
28, 1914. F. D. Monckton, Clerk.



101. Jno. H. Haggett,
NW $\frac{1}{4}$ -11-1 S., 5 E.,
Look. N.

Photograph by Fred H.
McClure, No. 10, 1908.

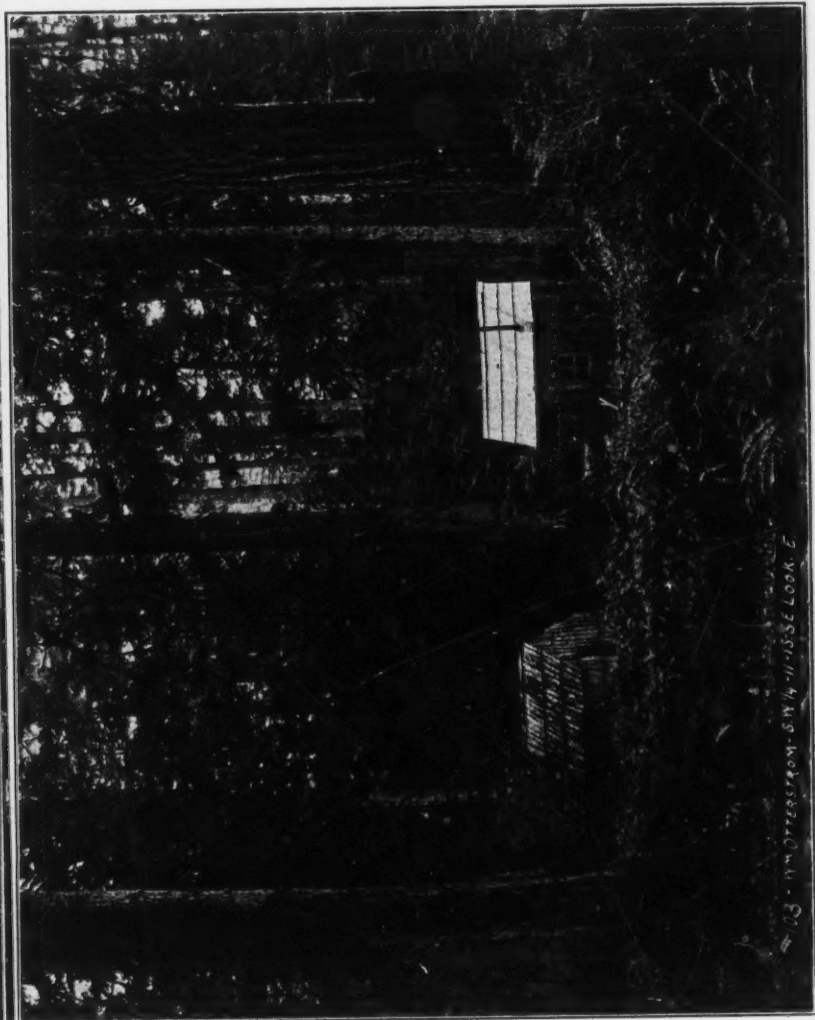
[Endorsed] No. 101, Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-101. Received March
28, 1914. F. D. Monckton, Clerk.



103. Wm. Otterstrom,
SW $\frac{1}{4}$ -11-1 S. 5 E., Look.
E.

Photograph by Fred H.
McClure, Nov. 11, 1908.

[Endorsed] No. 103. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-103. Received March
28, 1914. F. D. Monckton, Clerk.



103 - Wm. OTTERSTROM, SW $\frac{1}{4}$ -11-1 S. 5 E. LOOK. E.

104. Wm. Otterstrom,
SW $\frac{1}{4}$ -11-1 S., 5 E., Look
N.

Photograph by Fred H.
McClure, Nov. 11, 1908.

1Endorsed1 No. 104, Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-104, Received March
28, 1914. F. D. Monckton, Clerk.



Wm. Otterstrom, SW $\frac{1}{4}$ -11-1 S., 5 E., Look N.



106. Jno. F. Moan,
NW $\frac{1}{4}$ -15-1 S., 5 E.,
Look. S. W.

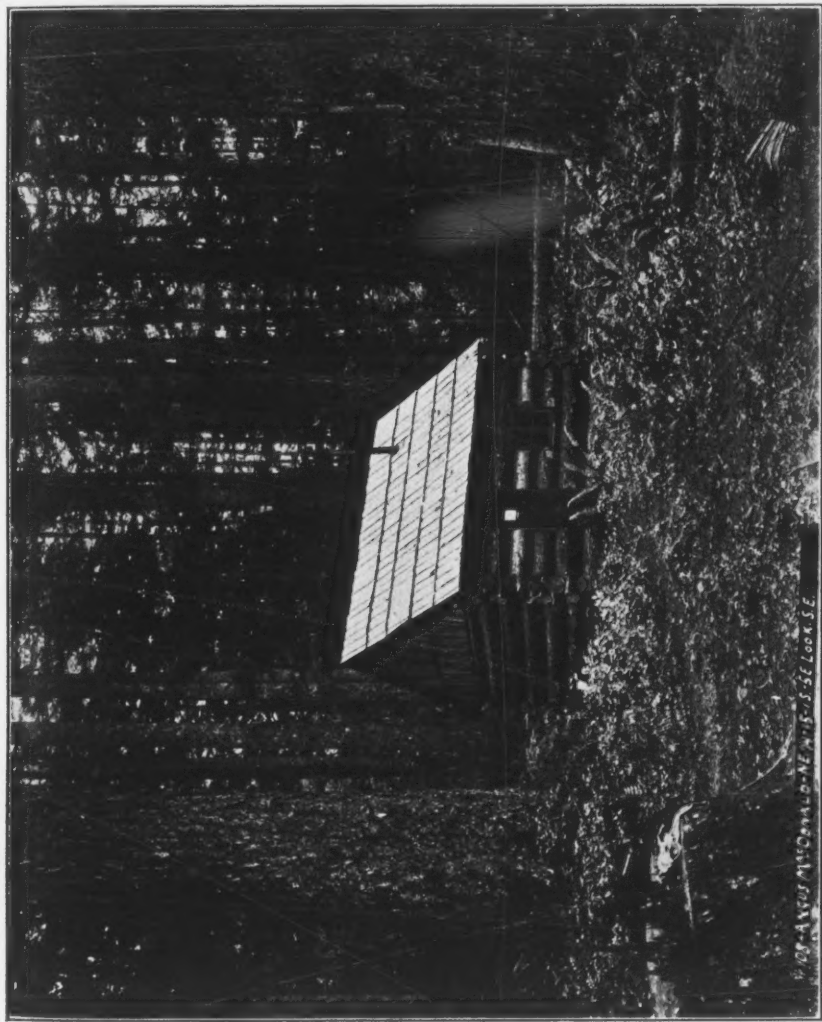
Photograph by Fred H.
McClure, Nov. 11, 1908.

[Endorsed] No. 106. Defts. Ex
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-106. Received March
28, 1914. F. D. Monckton, Clerk.

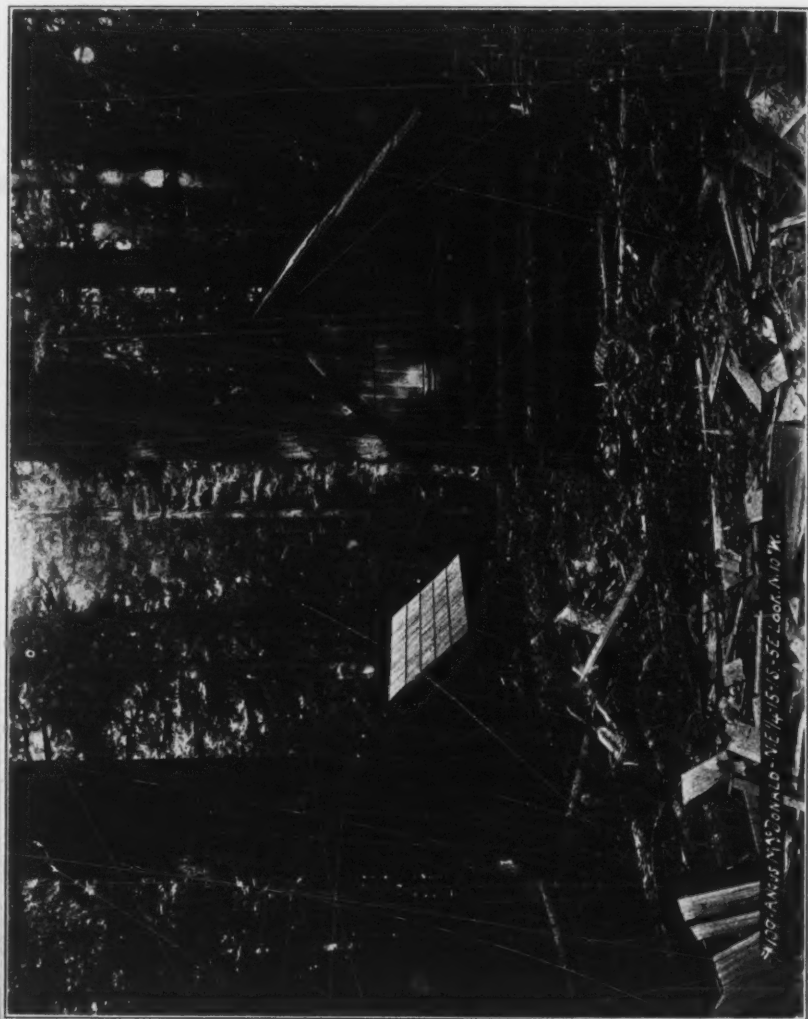
108. Angus MacDon-
ald, NE $\frac{1}{4}$ -15-1 S., 5 E.,
Look, S. E.

Photograph by Fred H.
McClure, Nov. 11, 1908.

[Endorsed] No. 108, Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-108. Received March
28, 1914. F. D. Monckton, Clerk.



108-A Angus MacDonald-NE $\frac{1}{4}$ -15-1 S. E. Look S. E.



109. Angus MacDon-
ald, NE $\frac{1}{4}$ -15-1 S., 5 E.,
Look N. 10° W.

Photograph by Fred H.
McClure, Nov. 11, 1908.

[Endorsed] No. 109. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-109. Received March
28, 1914. F. D. Monckton, Clerk.

111. R. T. Aldrich,
NE $\frac{1}{4}$ -13-1 S., 5 E., Look
S. E.

Photograph by Fred H.
McClure, Nov. 11, 1908.

[Endorsed] No. 111. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-111. Received March
28, 1914. F. D. Monckton, Clerk.



111 - RTALDRICH - NE $\frac{1}{4}$ 13 - 1 S - 5 E Look S. E.

112. R. T. Aldrich,
NE $\frac{1}{4}$ -13-1 S., 5 E., Look
N. W.

Photograph by Fred H.
McClure, Nov. 11, 1908.

[Endorsed] No. 112, Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-112, Received March
28, 1914. F. D. Monckton, Clerk.

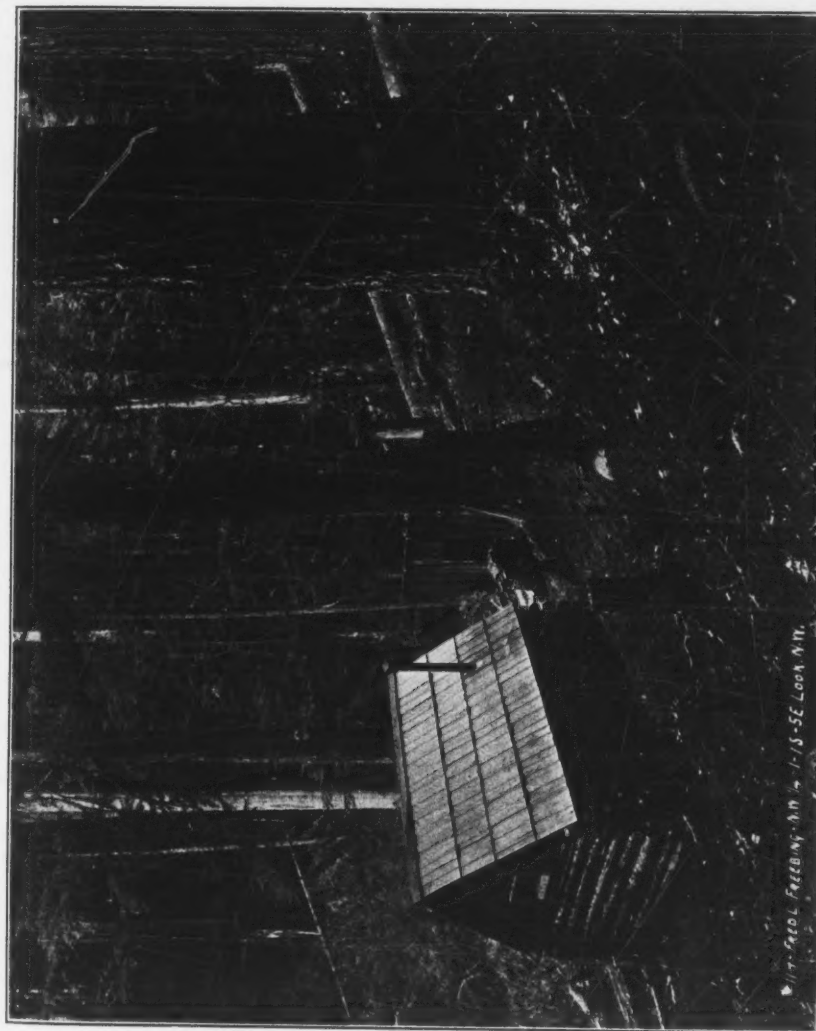


N. W. - 13-1 S. - 5 E. Look N. W.

114. Fred L. Free-
bing, NW $\frac{1}{4}$ -1-1 S., 5 E.,
Look. N. W.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 114, Defts. Ex.
270, Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270-114, Received March
28, 1914. F. D. Monckton, Clerk.



W. H. FRED L. FREEBING, NW $\frac{1}{4}$ -1-1 S. 5 E. LOOK N. W.

115. Fred L. Free-
bing, NW $\frac{1}{4}$ -1-1 S., 5 E.,
Look. E.

Photograph by Fred H.
McClure, Nov. 12, 1908.

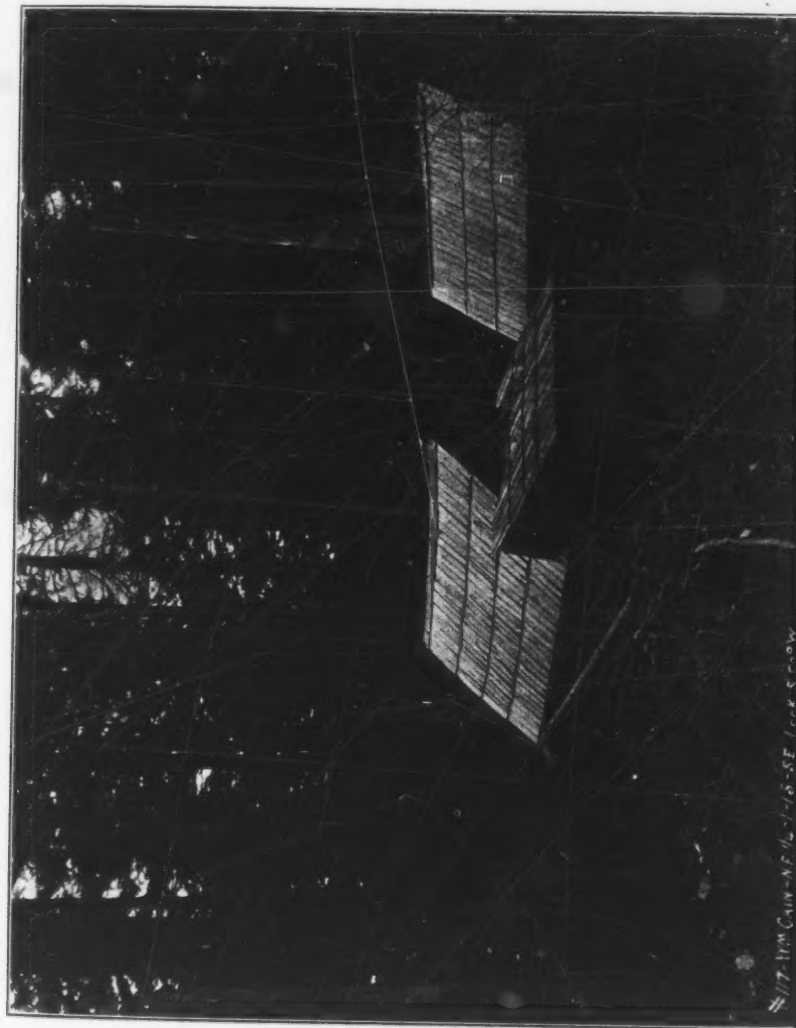
[Endorsed] No. 115. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-115. Received March
28, 1914. F. D. Monekton, Clerk.



117. Wm. Cain, NE $\frac{1}{4}$ -
1-1 S., 5 E., Look. S. 50°
W.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 117. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-117. Received March
28, 1914. F. D. Monckton, Clerk.



117-Wm Cain-NE $\frac{1}{4}$ -1-1 S-5E Look S-W

118. Wm. Cain, NE 1/4-
1-1 S., 5 E., Look. N. E.
Photograph by Fred H.
McClure, Nov. 12, 1908.

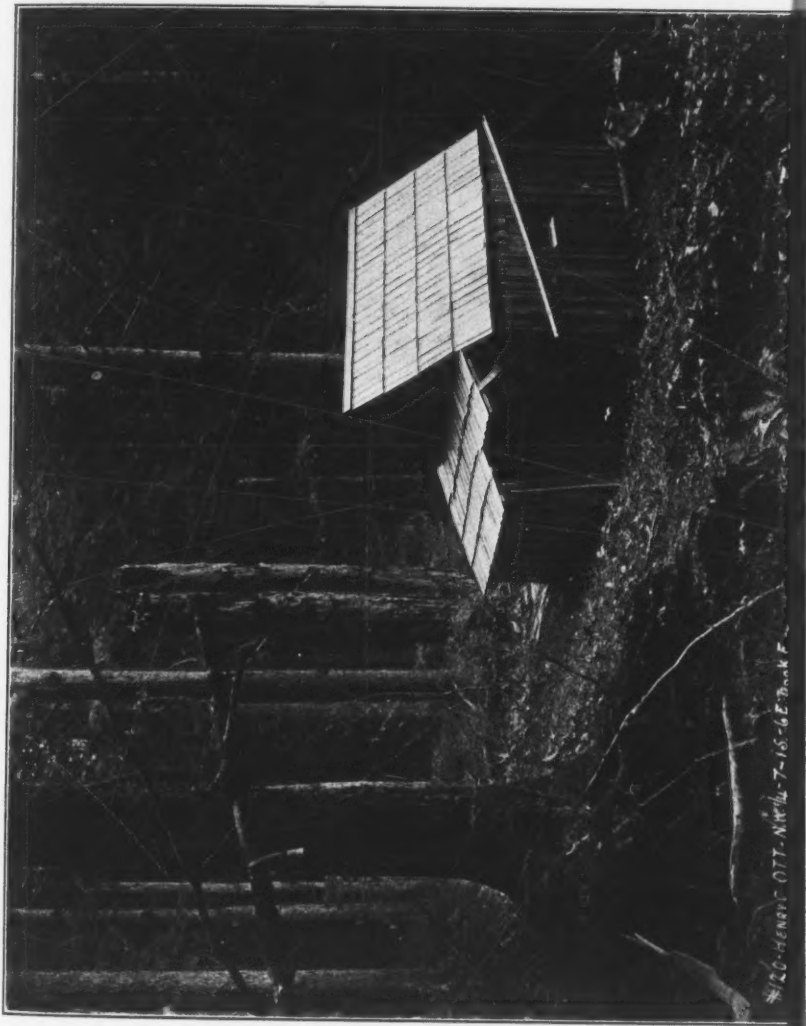
[Endorsed] No. 118. Defts. Ex.
270, Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-118. Received March
28, 1914. F. D. Monckton, Clerk



120. Henry C. Ott,
NW $\frac{1}{4}$ -7-1 S., 6 E., Look
E.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 120, Defts. Ex.
270, Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 270.120, Received March
28, 1914. F. D. Monckton, Clerk.



#120-HENRY OTT-NW $\frac{1}{4}$ -7-1S-6E-look E.



121. Henry C. Ott,
NW $\frac{1}{4}$ -7-1 S., 6 E., Look,
S. W.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 121. Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-121. Received March
28, 1914. F. D. Monckton, Clerk.



123. J. D. Hadley,
NE $\frac{1}{4}$ -7-1 S., 6 E., Look.
S. 10° W.

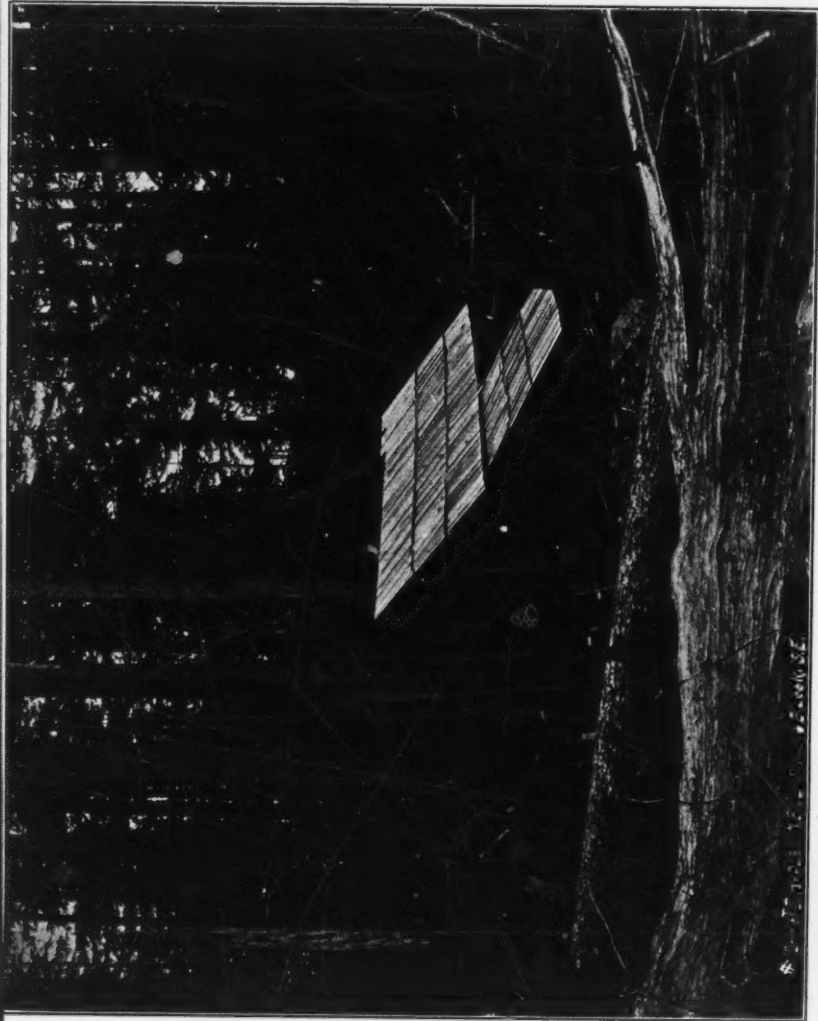
Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 123. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-123. Received March
28, 1914. F. D. Monckton, Clerk.

124. J. D. Hadley,
NE $\frac{1}{4}$ -7-1 S., 6 E., Look,
S. E.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 124, Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-124. Received March
28, 1914. F. D. Monckton, Clerk.



126 Jas. C. O'Neill,
SE $\frac{1}{4}$ -5-1 S., 6 E., Look.
S. 10° E.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 126, Defs. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defs. Ex. 270-126. Received March
28, 1914, F. D. Monckton, Clerk.



126-1-5-1 S. 6 E. Look S. 10° E.



127. Jss. C. O'Neill,
SE $\frac{1}{4}$ -5-1 S., 6 E., Look,
N. 60° E.

Photograph by Fred H.
McClure, Nov. 12, 1908.

[Endorsed] No. 127. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-127. Received March
28, 1914. F. D. Monckton, Clerk.

2944. J. H. Lewis cabin on W $\frac{1}{2}$ of E $\frac{1}{2}$ Section 9, T. 4 N., R. 3 W. (patented Oct. 9, 1895) Settlers' suit filed Feb. 6, 1908. This picture shows that some additional buildings have been erected since the former photograph was taken by McClure on Feb. 14, 1908. No clearing has been made and the premises are not occupied.

(See letter A. W. Rees, June 28, 1912. File 464)

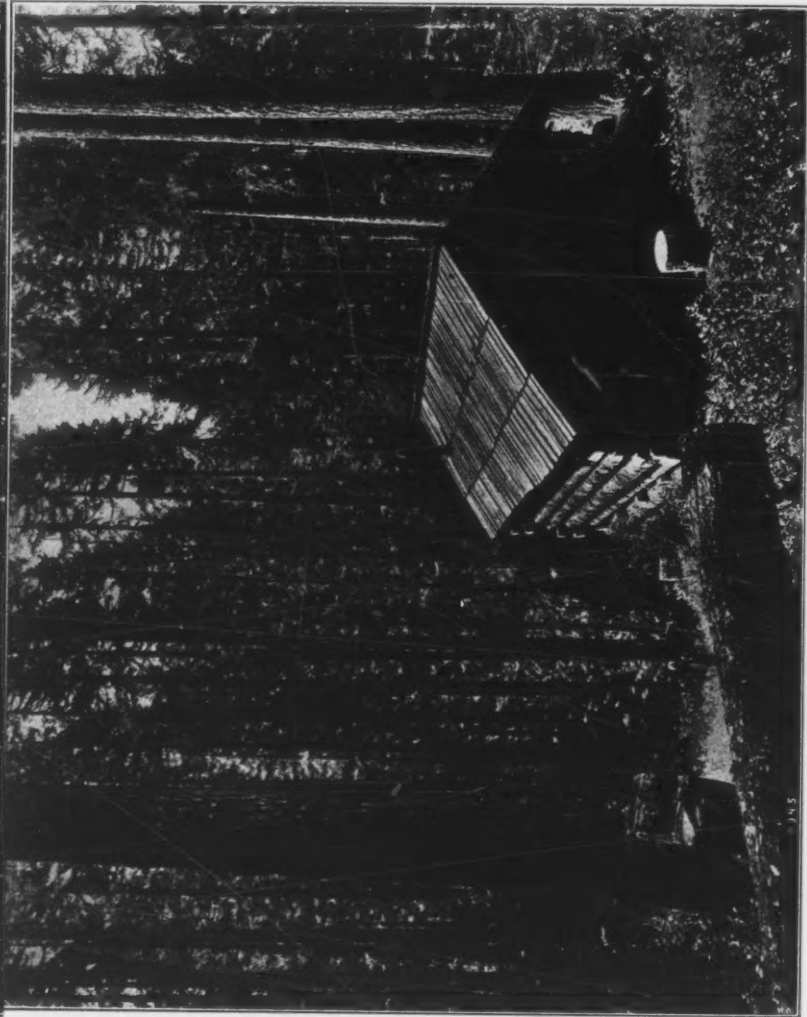
[Endorsed] No. 2944, Defts. Ex. 270, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-2944, Received March 28, 1914. F. D. Monckton, Clerk.

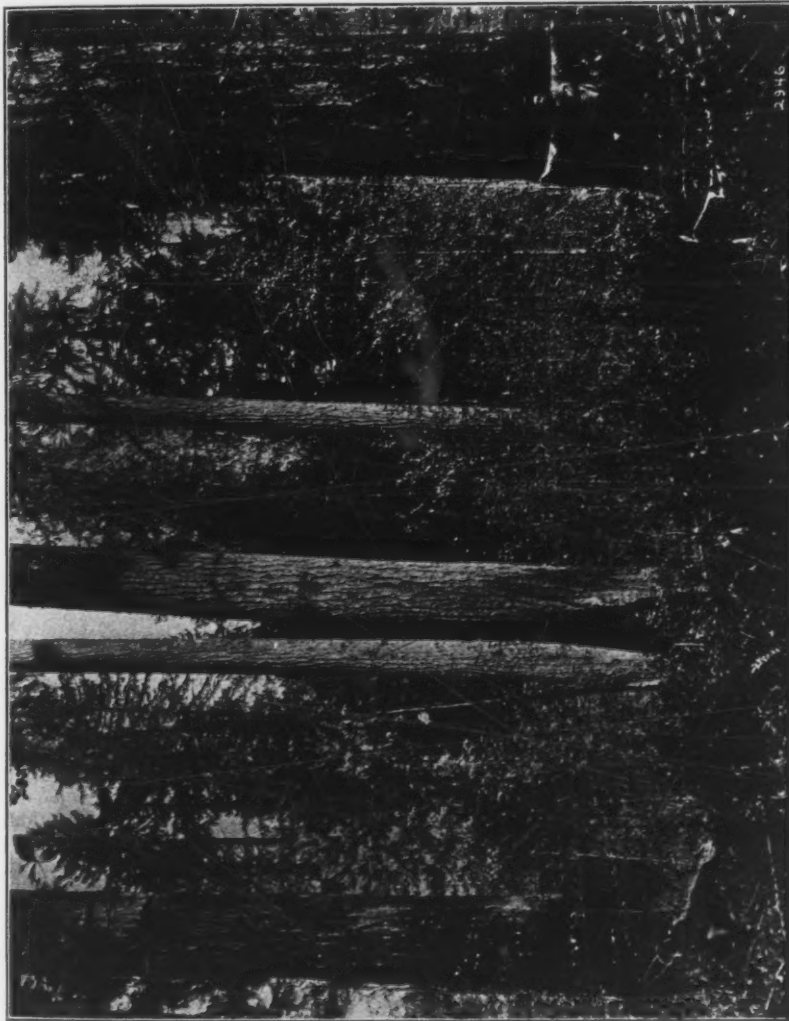


2945. James Barr cabin on E $\frac{1}{2}$ of E $\frac{1}{2}$ Section 9, T. 4 N., R. 3 W. (patented Oct. 9, 1895). This is O & C Co. land upon which Barr filed settlers' suit November 27, 1908. The cabin has never been occupied permanently.

(See letter A. W. Rees, June 28, 1912. File 464)

[Endorsed] No. 2945. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-2945. Received March 28, 1914. F. D. Monckton, Clerk.





2946. Timber view in
NW $\frac{1}{4}$ Section 9, T. 4 N.,
R. 3 W. (Patented Oct.
9, 1895)

(See letter A. W. Rees,
June 28, 1912—File 464)

[Endorsed] No. 2946. Defts. Ex.
270. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 270-2946. Received March
28, 1914. F. D. Monckton, Clerk.

2948. Cabin built on the SW $\frac{1}{4}$ of Section 9, T 4 N., R. 3 W., by M. F. Dennis in 1907 (Patented Oct. 9, 1895). The cabin is not occupied. Carter and Dennis built cabins on this land about the time the so-called Lafferty Suits were being filed, but have never occupied the premises permanently, and I do not know their present whereabouts.

(See letter A. W. Rees, June 28, 1912—File 464)

[Endorsed] No. 2948, Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-2948. Received March 28, 1914. F. D. Monckton, Clerk.

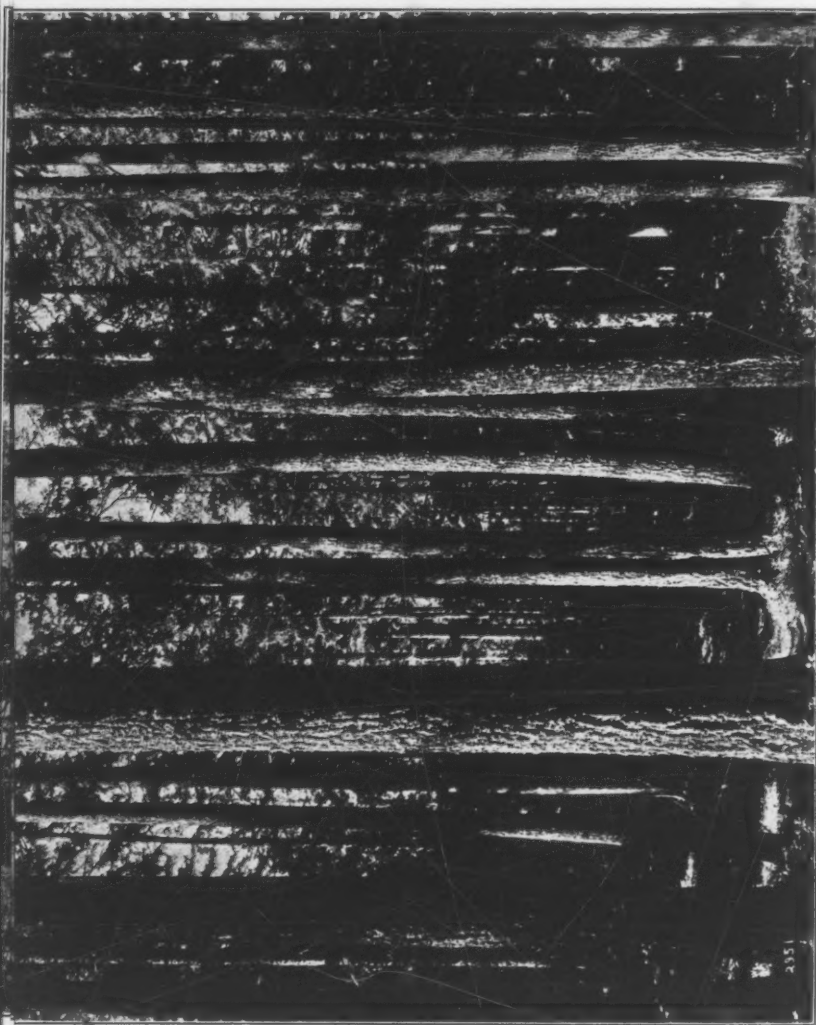




2950. Timber view of NW $\frac{1}{4}$ Section 9, T. 4 N., R. 3 W.
(Patented Oct. 9, 1895)

(See letter A. W. Rees, June 28, 1912—File 464)

[Endorsed] No. 2950. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-2950. Received March 28, 1914. F. D. Monckton, Clerk.



2951. Timber view of NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 9, T. 4 N., R. 3 W. (Patented Oct. 9, 1895) showing exceptionally heavy stand of timber.

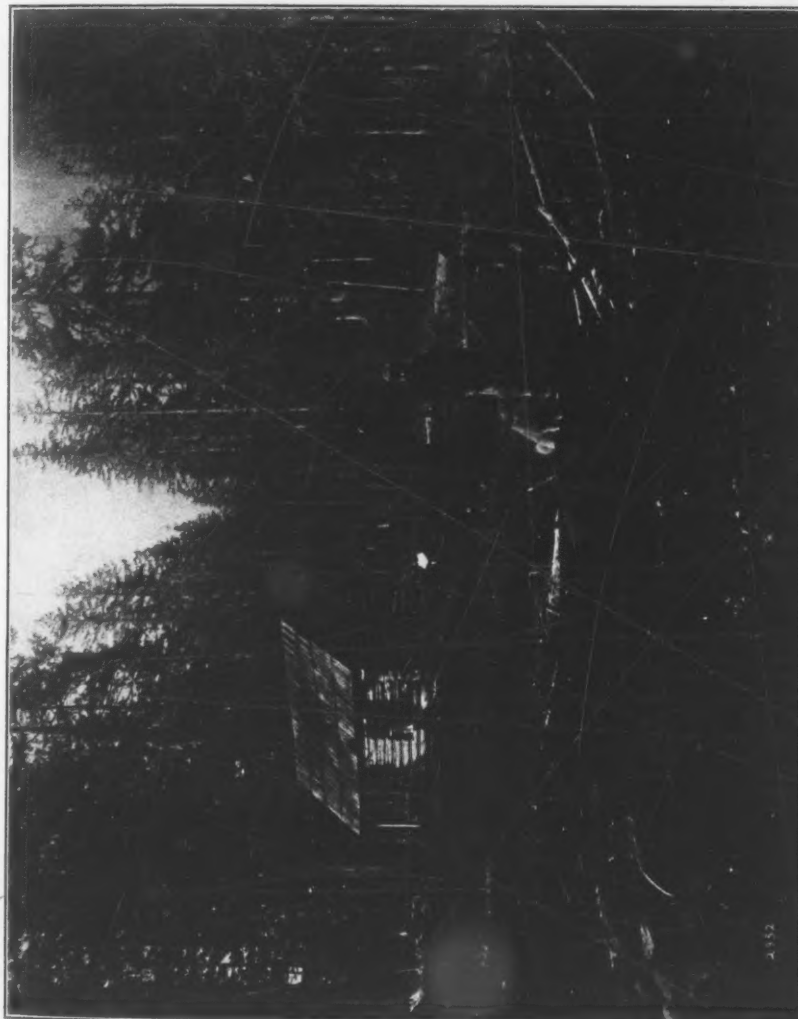
(See letter A. W. Rees June 28, 1912—File 464.)

[Endorsed] No. 2951. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-2951. Received March 28, 1914. F. D. Monckton, Clerk.

2952. Cabin built by Frank Carter in 1907 upon the NW $\frac{1}{4}$ of Section 9, T. 4 N., R. 3 W. (Patented Oct. 9, 1895). Carter claimed to be an actual settler, but never occupied the premises as a permanent home.

(See letter A. W. Rees June 28, 1912—File 464.)

[Endorsed] No. 2952. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-2952. Received March 28, 1914. F. D. Monckton, Clerk.

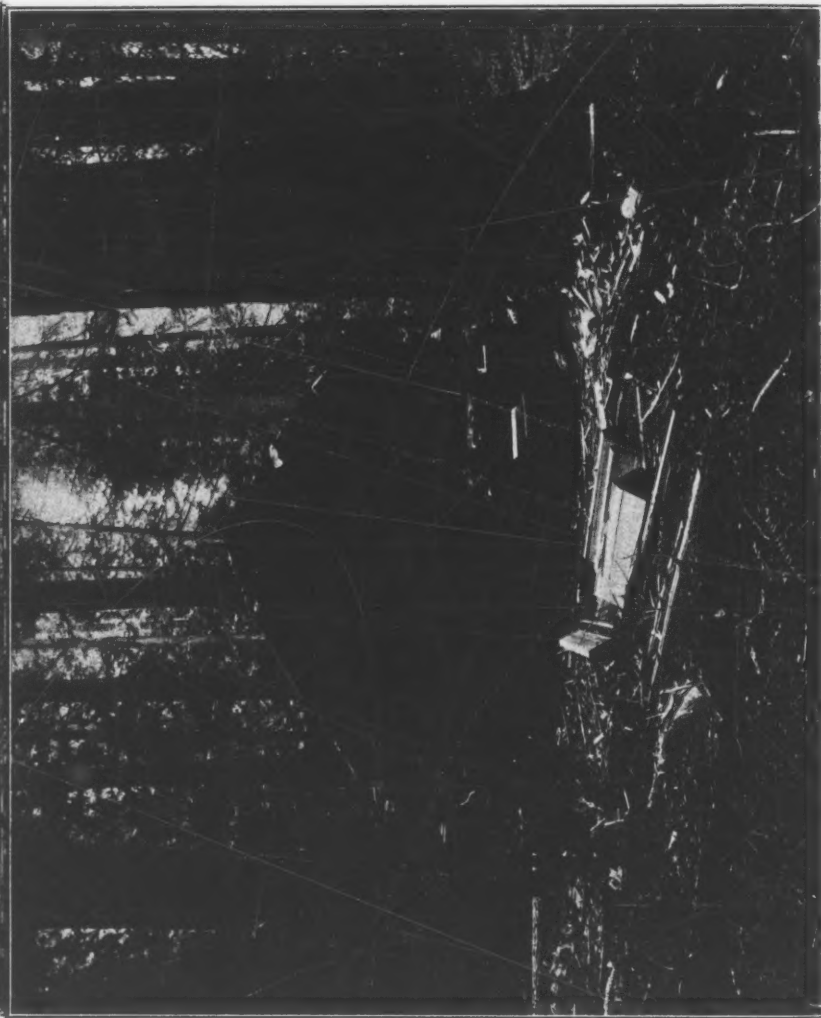


1. This is a picture of the front view of John L. Snyder's cabin, on SE $\frac{1}{4}$ of Section 17, Township 4 North, Range 3 West. The view is taken looking northwest.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 1. Defs. Ex. 270. Case No. 2400-1. S. Circuit Court of Appeals, Ninth Circuit, Defs. Ex. 270-1. Received March 28, 1914. F. D. Monckton, Clerk.

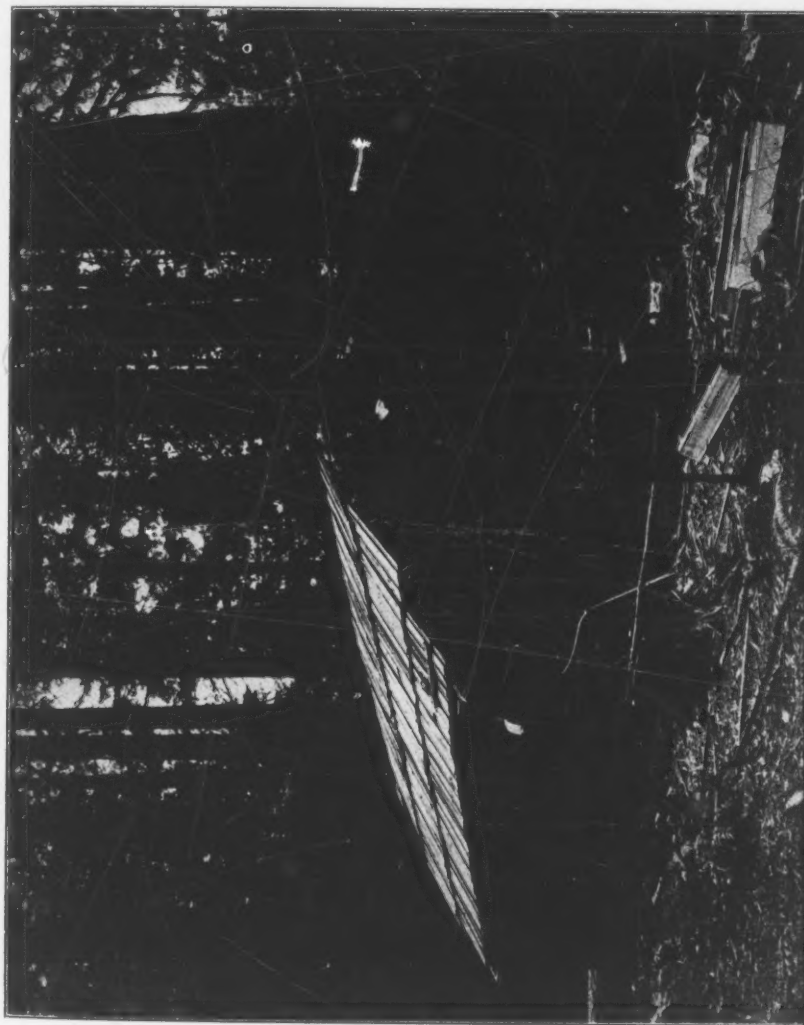


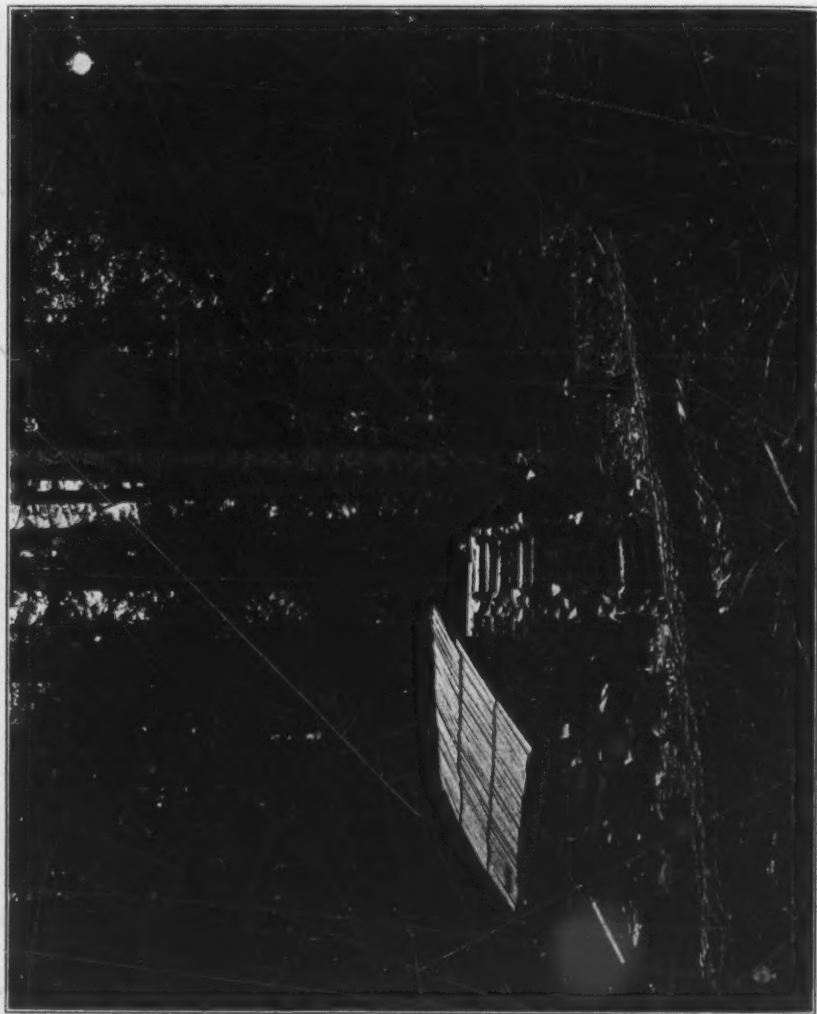
2. This is a picture of John L. Snyder's cabin on the Southeast Quarter of Section 17, Township 4 North, Range 3 West. The notice of Snyder's entry may be seen tacked on the side of cabin. The view is taken looking northeast. This picture, taken together with No. 3, shows all four sides and all the roof of Snyder's cabin, and shows that there is no window or other means of admitting light into the cabin.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 2, Defts. Ex. 270, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 270-2. Received March 28, 1914. F. D. Monckton, Clerk.





3. This is a view of the rear of John L. Snyder's cabin on the SE $\frac{1}{4}$ of Section 17, Township 4 North, Range 3 West. It also shows the depredations committed by Snyder and shows also the only clearing that has been done by him. It also shows a very heavy stand of timber upon the land. View is taken looking southwest.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 3, Defts. Ex. 270, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-3. Received March 28, 1914. F. D. Monckton, Clerk.



4. This is a view of the timber upon the southeast corner of the SE $\frac{1}{4}$ of Section 17, Township 4 North, Range 3 West. The man appearing in the picture is standing at the southeast corner of Section 17. The cabin appearing through the timber in the distance is that of John L. Snyder. The view is taken looking northwest.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 4. Defts. Ex. 270. Case No. 2400--U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-4. Received March 28, 1914. F. D. Monckton, Clerk.



6. This picture was taken on the southeast corner of the SE $\frac{1}{4}$ of Section 17, Township 4 North, Range 3 West. The view was taken looking northeasterly. The size of the timber may be judged by comparison with the man standing near the large tree in the center.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 6. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-6. Received March 28, 1914. F. D. Monckton, Clerk.



7. This is a view taken on the northeast corner of the SE $\frac{1}{4}$ of Section 17, Township 4 North, Range 3 West. The land in this vicinity is very rough but the picture has failed to bring out this feature of the topography. The view was taken looking northwest.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

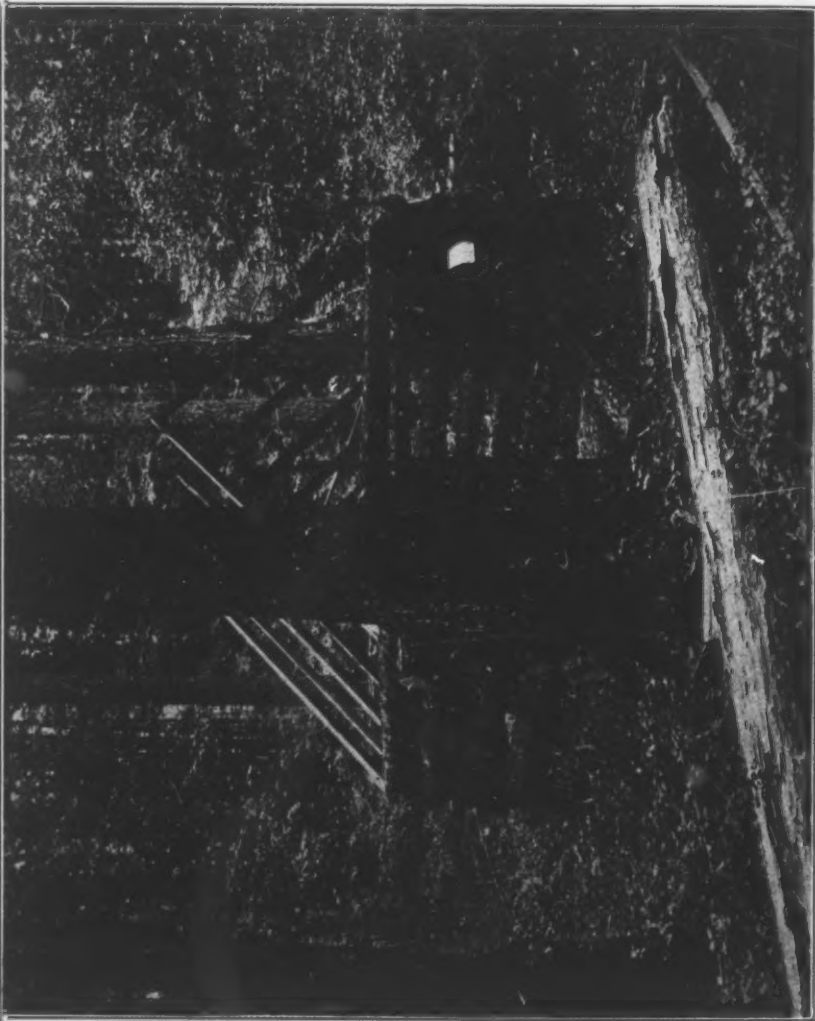
[Endorsed] No. 7. Defts. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-7. Received March 28, 1914. F. D. Monckton, Clerk.

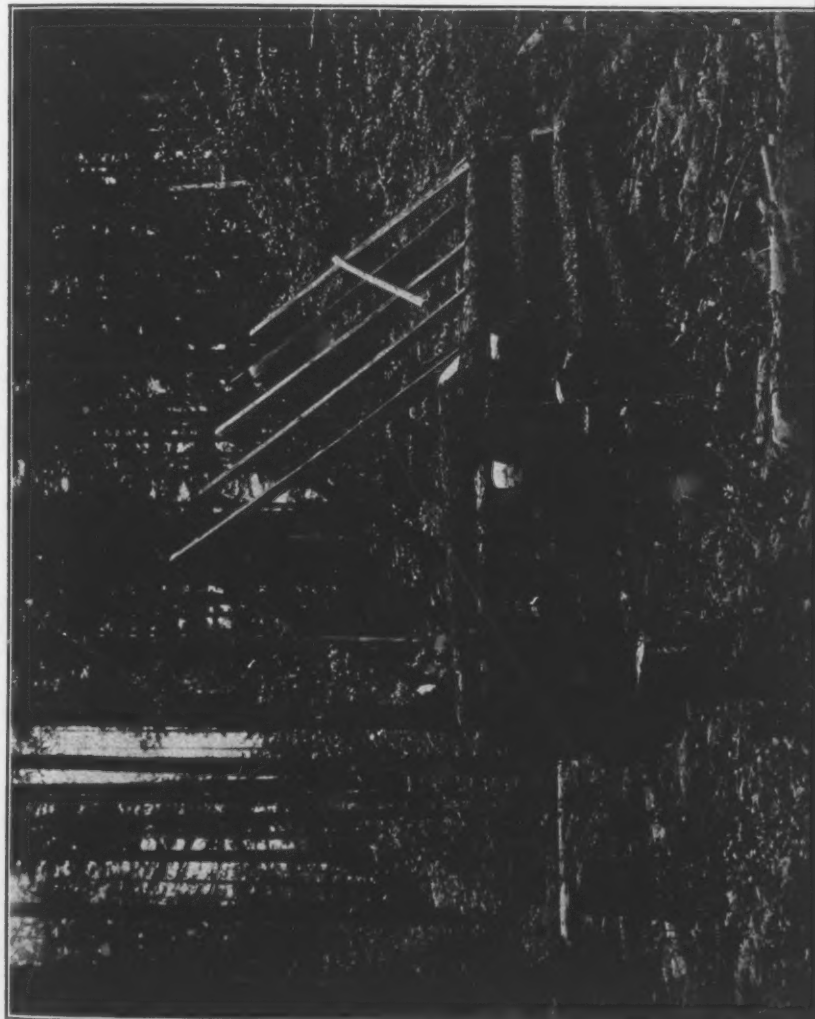
8. This is a picture of cabin erected by J. W. Barker on the NW $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 9, Township 4 North, Range 3 West. Barker has notice posted upon the cabin that he is an "actual settler" and is taking the tract of land under the Act of Congress of April 10, 1869. The cabin is situated 5 chains East of the one-fourth section corner between Sections 8 and 9, the view looking south.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 8, Defs. Ex. 270. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 270.8. Received March 28, 1914. F. D. Monckton, Clerk.





9. This is a picture of cabin erected by W. M. Ross on the SW $\frac{1}{4}$ of Section 9, Township 4 North, Range 3 West. Ross has notice posted upon the cabin that he is an "actual settler" and is taking the tract of land under the Act of Congress of April 10, 1869. The cabin is situated 3 chains south of one-fourth post, the view looking southeast.

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 9, Defis. Ex. 280, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defia. Ex. 270-9. Received March 28, 1914. F. D. Monckton, Clerk.

10. This is a picture of cabin erected by Ezra Booth on the NW¼ of Section 21, Township 4 North, Range 3 West. Booth has notice posted upon the cabin that he is an "actual settler" and is taking the tract of land under Act of Congress of April 10, 1869. The cabin is 14x16 ft., inside measurement, 7 ft. eaves and 10 ft. gable. It is built of split cedar and is not battened nor chinked. There is no shutter to door opening. The floor is of dirt. There is nothing in the cabin and it has not been occupied. The cabin is situated 50 feet east and 20 feet south of corner, the view looking southeast.

The following trees have been cut and the material used in construction of cabin:

1 cedar	7 in. 20 linear ft..	\$.50
2 "	9 " 60 " "	1.50
1 "	11 " 50 " "	1.75
14 "	5 " 480 B.M. ft..	7.25
2 "	18 " 480 B.M. ft..	10.50
1 "	24 " 700 B.M. ft..	21.70

This picture was taken by Fred H. McClure, September 25, 1907.

(Signed) Homer D. Angell.

[Endorsed] No. 10, Defts. Ex. 270, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 270-10. Received March 28, 1914. F. D. Monckton, Clerk.



DEFENDANTS' EXHIBIT
273

**CONSISTS
OF 84 PHOTOGRAPHS
NUMBERED FOR CONVENIENCE
AS FOLLOWS:**



50 W 4 Sec 24 T 10 S R 1 E

1. On the back of this picture appears the following: SW $\frac{1}{4}$ of Sec. 24, T. 10 S., R. 1 E. Showing abandoned cabin and field grown up to weeds and brush.

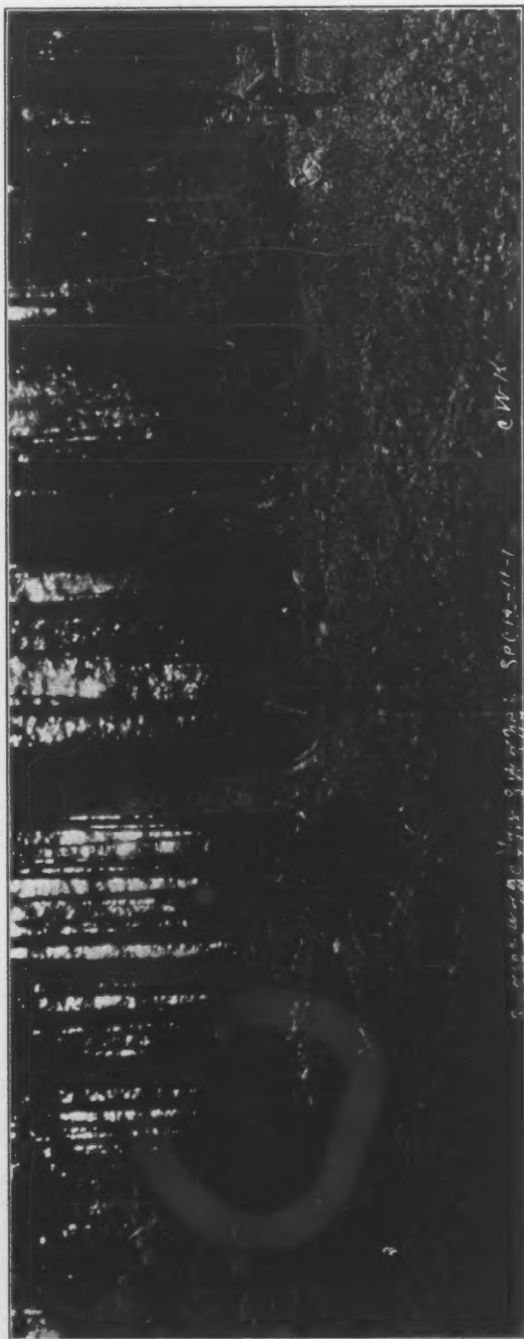
[Endorsed] No. 1. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-1. Received March 28, 1914. F. D. Monckton, Clerk.

THIS PAGE
VERTICAL



2. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 14. T. 11 S., R. 1 E. Looking north $\frac{1}{4}$ mile west of quarter post on east line.

[Endorsed] No. 2. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273.2. Received March 28, 1914. F. D. Monckton, Clerk.



3. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 14, T. 11 S., R. 1 E. Looking NW. Showing location of improvements—cabin tumbled down. NE $\frac{1}{4}$ Sec. 14—11 S R 1 E Taken from $\frac{1}{4}$ corner Btw. 13-14 Looking North. Showing improvements. (2) Views—one showing timber.

[Endorsed] No. 3. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-3. Received March 28, 1914. F. D. Monckton, Clerk.



4. On the back of this picture appears the following: Cabin on SW corner of Sec. 25, T. 4 N., R. 3 W. Built by Fred Witte, 1907. Suit filed 12/2/07. Not occupied May 1912.

[Endorsed] No. 4. Defts. Ex. 273. Case No. 2400—U, S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 273-4. Received March 28, 1914. F. D. Monckton, Clerk.

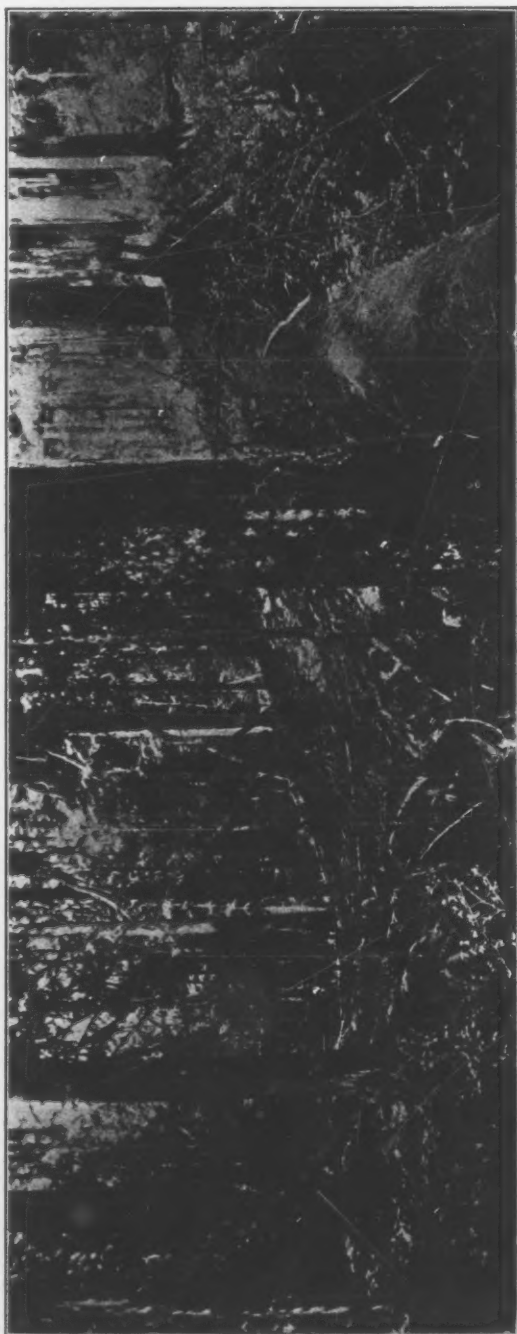


5. On the back of this picture appears the following: Taken at Secs. corners 25, 26, 35, & 36, T. 4 N., R. 3 W., look from the West to N.E.

[Endorsed] No. 5. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-5. Received March 28, 1914. F. D. Monckton, Clerk.

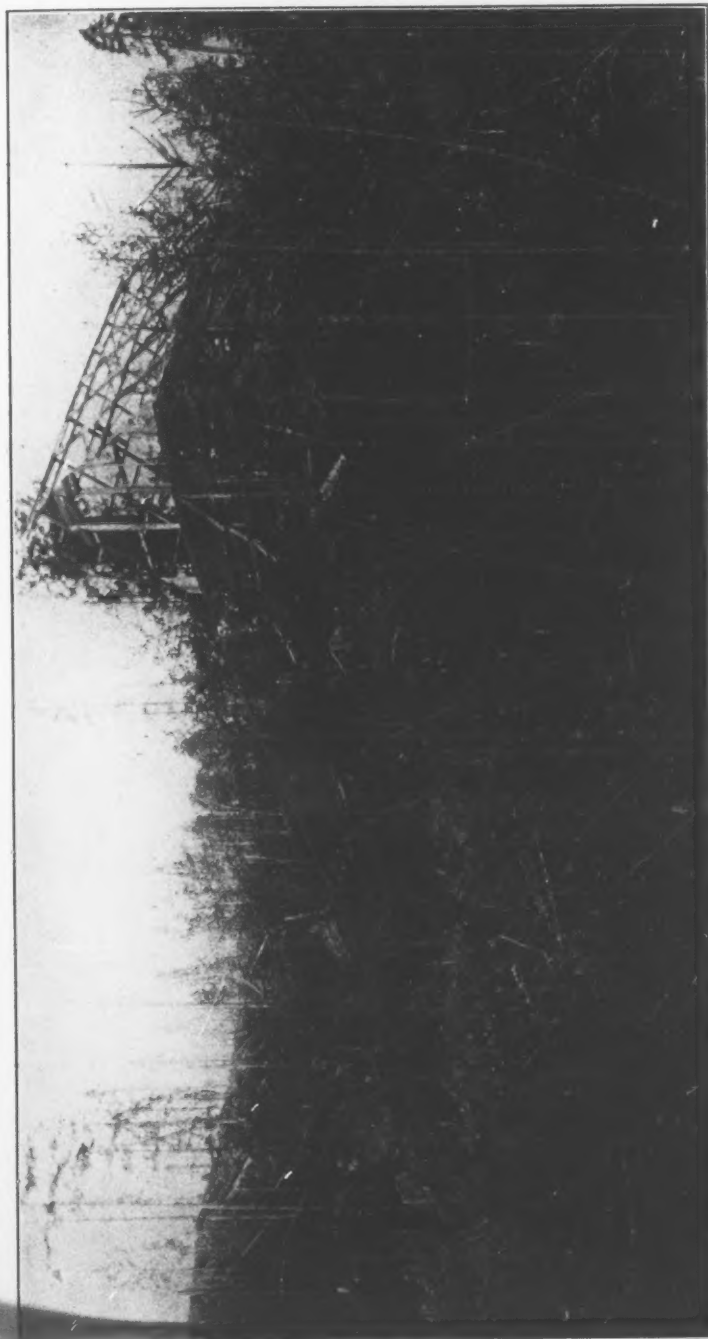


6. On the back of this picture appears the following: NW $\frac{1}{4}$ Sec. 8, 4 N. 3 W., look. N & NW, Homestead cabin.
[Endorsed] No. 6. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-6. Received March 28, 1914. F. D. Monckton, Clerk.



7. On the back of this picture appears the following: Timber view NW $\frac{1}{4}$ Sec. 21, T. 4 N., R. 3 W.

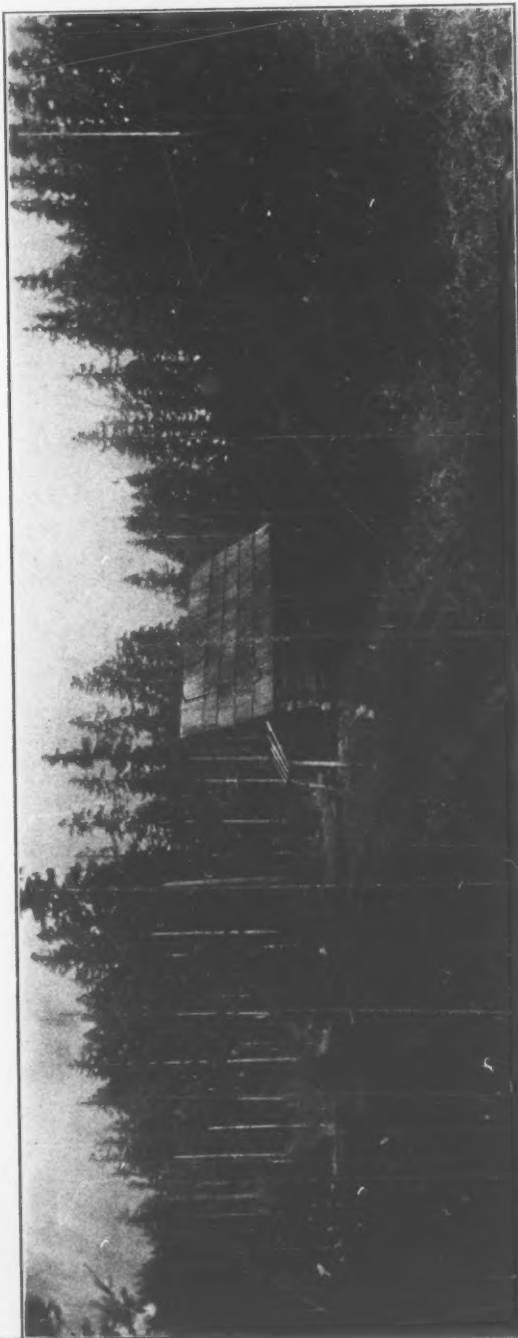
[Endorsed] No. 7. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-7. Received March 28, 1914. F. D. Monckton, Clerk.



8. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 24, T. 4 N., R. 3 W., all logged off. Showing homesteader's cabin.

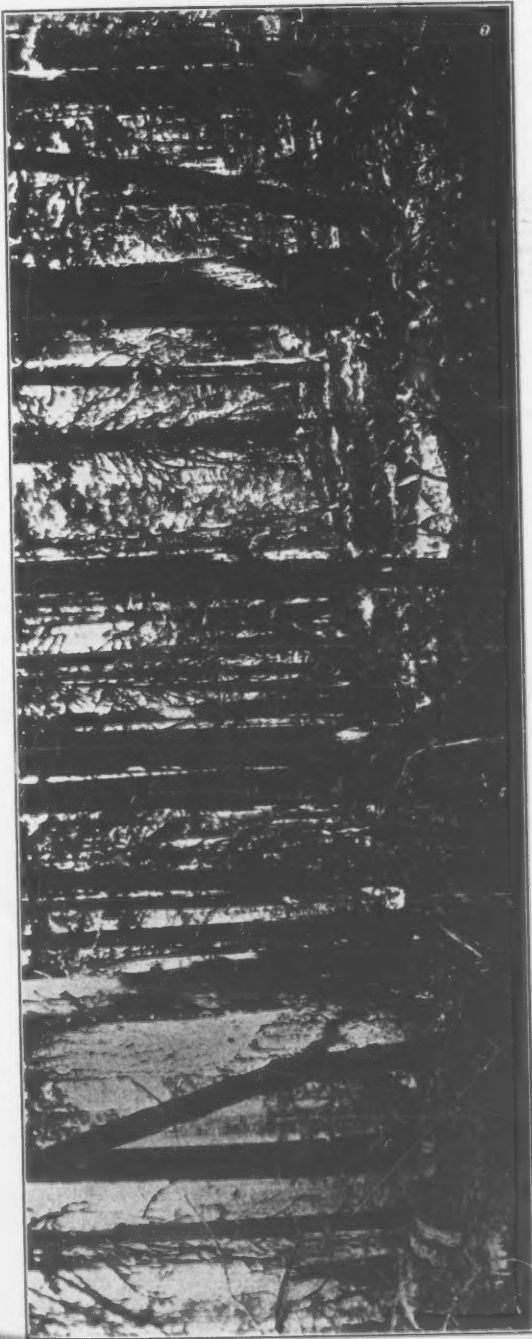
[Endorsed] No. 8. Defts, Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts, Ex. 273-8. Received March 28, 1914. F. D.

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9. On the back of this picture appears the following: Sec. 4, NW $\frac{1}{4}$, 4 N., 3 W. Taken from SW $\frac{1}{4}$ looking N & NW. Homestead cabin.

[Endorsed] No. 9. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-9. Received March 28, 1914. F. D. Monckton, Clerk.



10. On the back of this picture appears the following. Center of Northwest quarter Sec. 20, T. 4 North, R. 3 W. Looking North.

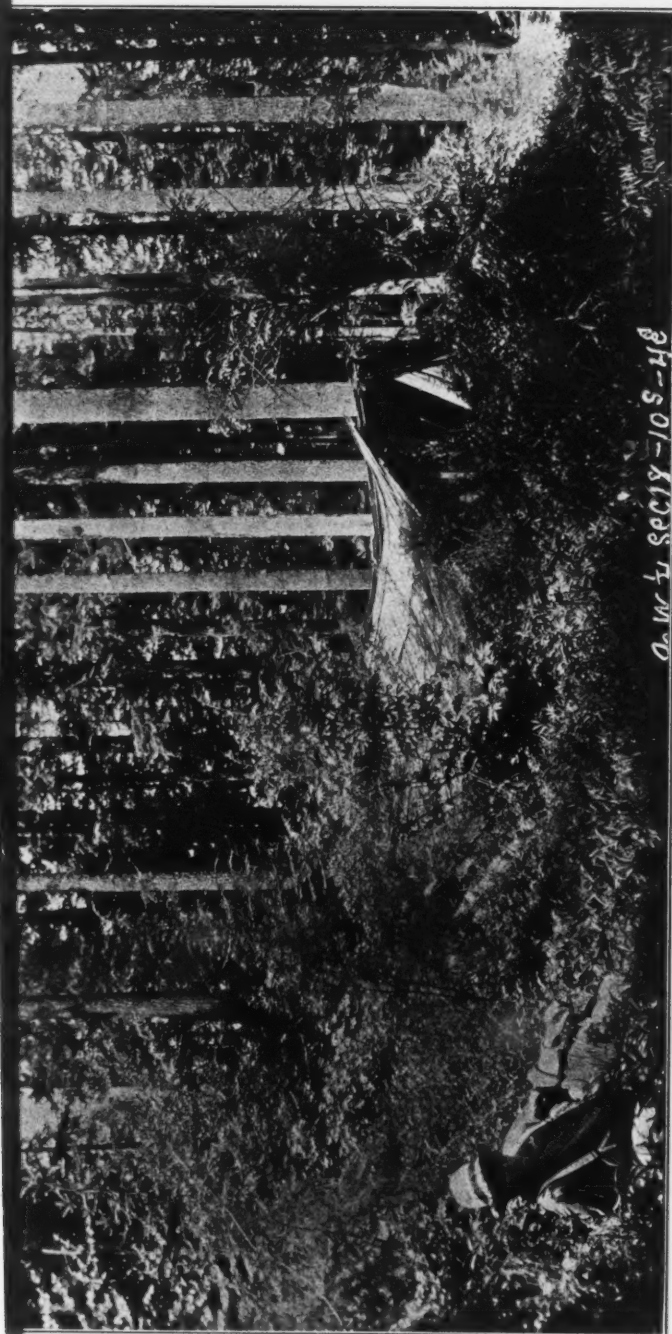
[Endorsed] No. 10. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-10. Received March 28, 1914. F. D. Monckton, Clerk.

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AL IN BOOK

88938



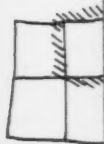
on W to SEC 18 - 10 S - 4 E

11. On the back of this picture appears the following: NW¼ Sec. 18, T. 10 S., R. 4 E. Looking Northwest. Showing remains of improvements.

[Endorsed] No. 11. Defs. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 273-11. Received March 28, 1914. F. D. Monckton, Clerk.



12. On the back of this picture appears the following: "C" SE $\frac{1}{4}$ Sec. 20, 7 S. 7 W. Hld. of Robt. B. Hansen, Filed 7/3/00, Pat. 1/23/02. Taken Mch. 29, 1912, by C. W. Kempton, Looking North. Kempton's Report: Not occupied—no improvements (burnt down)—no cultivation—no clearing—entry made for timber values.

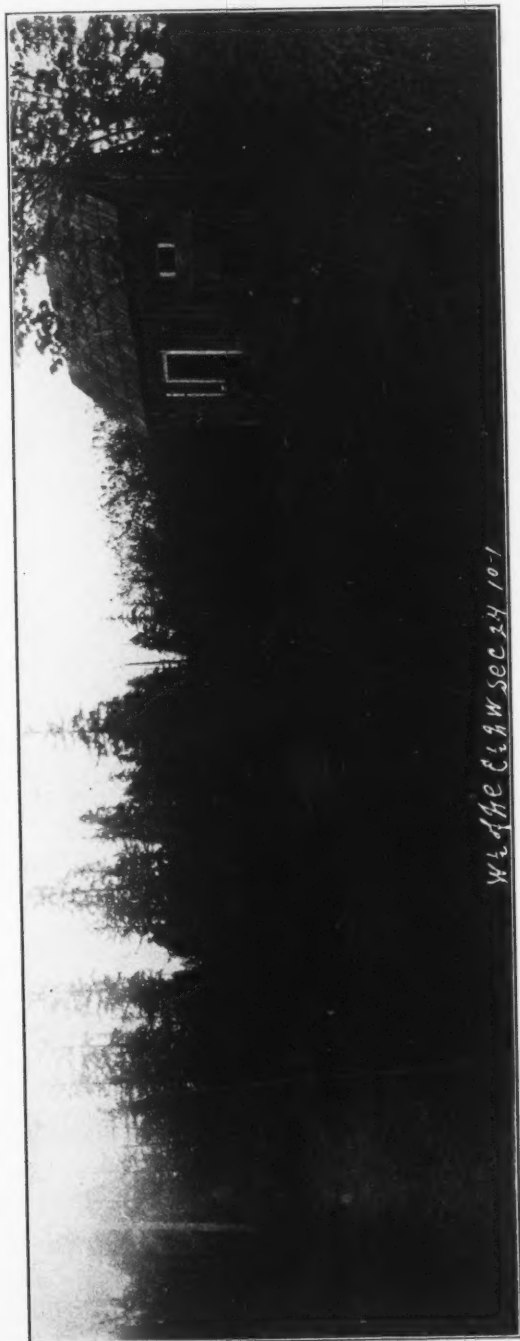




13. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 12, 11 S. 1 E.

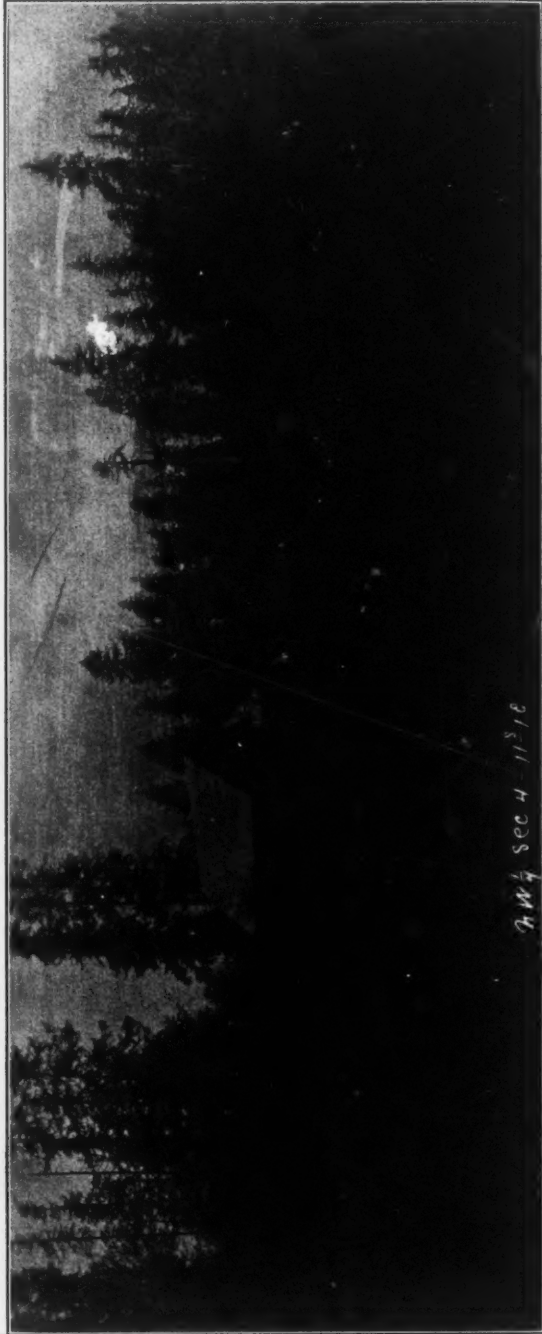
[Endorsed] No. 13, Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-13. Received March 28, 1914. F. D. Monckton, Clerk.

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W.L. & H.E. Clear Sec 24 10-1

14. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 30, 10 S., R. 1 E. (2) views, one of clearing, one in timber.
 [Endorsed] No. 14. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-14. Received March 28, 1914. F. D. Monckton, Clerk.



NW 1/4 Sec 4 - 11³ 16

15. On the back of this picture appears the following: NW $\frac{1}{4}$ Sec. 4, T. 11 S., R. 1 E. Looking NW. Showing abandoned cabin and field.

[Endorsed] No. 15. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-15. Received March 28, 1914. F. D. Monckton, Clerk.



16. On the back of this picture appears the following: High ridge. Looking North bet. Secs. 20 and 21. View taken March 29, 1912, by C. W. Kempton field examiner O&C RR. Co. Showing character of 7 S. 7 W. Note the Robt. B. Hansen homestead will cover the lands marked on photo. (Approximate)

[Endorsed] No. 16. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-16. Received March 28, 1914. F. D. Monckton, Clerk.



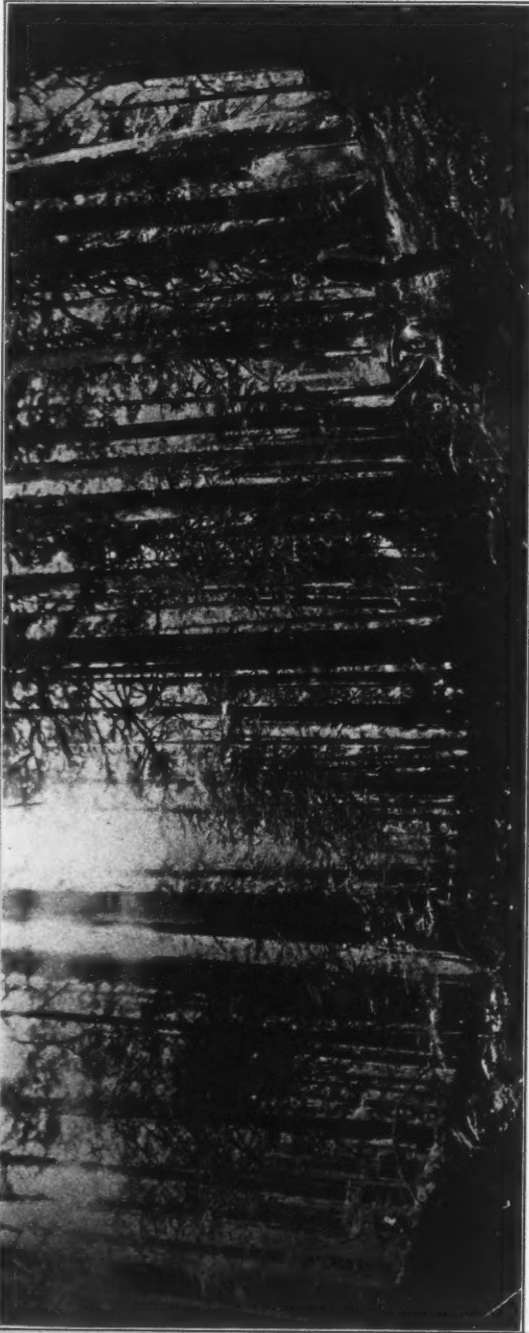
17. On the back of this picture appears the following: Photo by C. W. Kempton 5/7/12. SE $\frac{1}{4}$ Sec. 26, 4 S. R. 5 E. Looking Southeast. No improvements except pile of stones which appear to have been used as temporary fire place.

[Endorsed] No. 17. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-17. Received March 28, 1914. F. D. Monckton, Clerk.

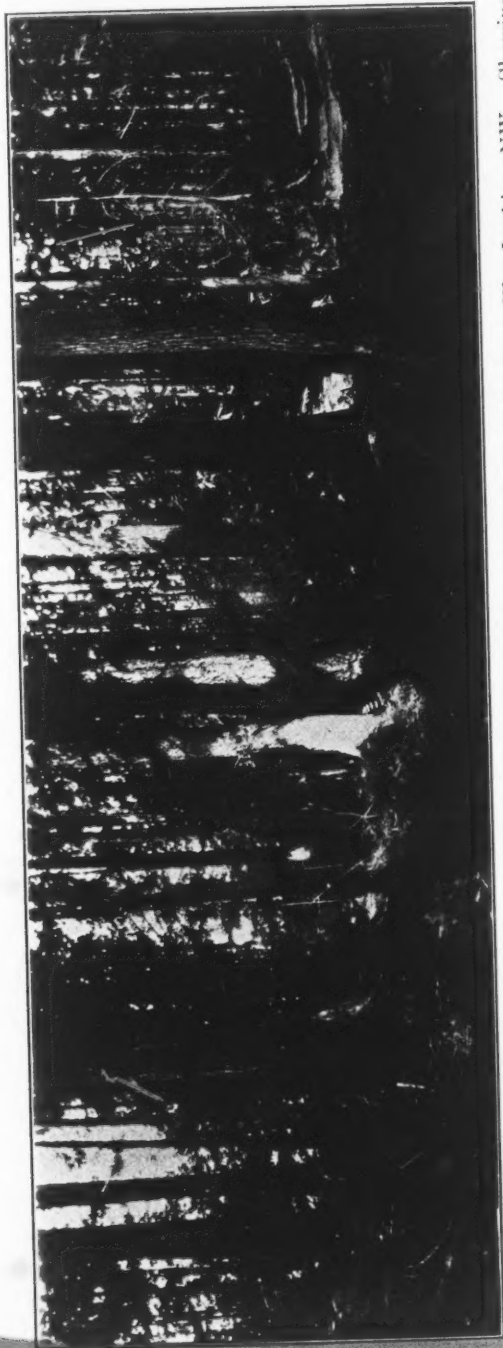


18. On the back of this picture appears the following: $W\frac{1}{2}$ of $E\frac{1}{2}$ Sec. 9, T. 4 N., R. 3 W. Lewis claim O&C lands. Not occupied.

[Endorsed] No. 18. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-18. Received March 28, 1914. F. D. Monckton, Clerk.

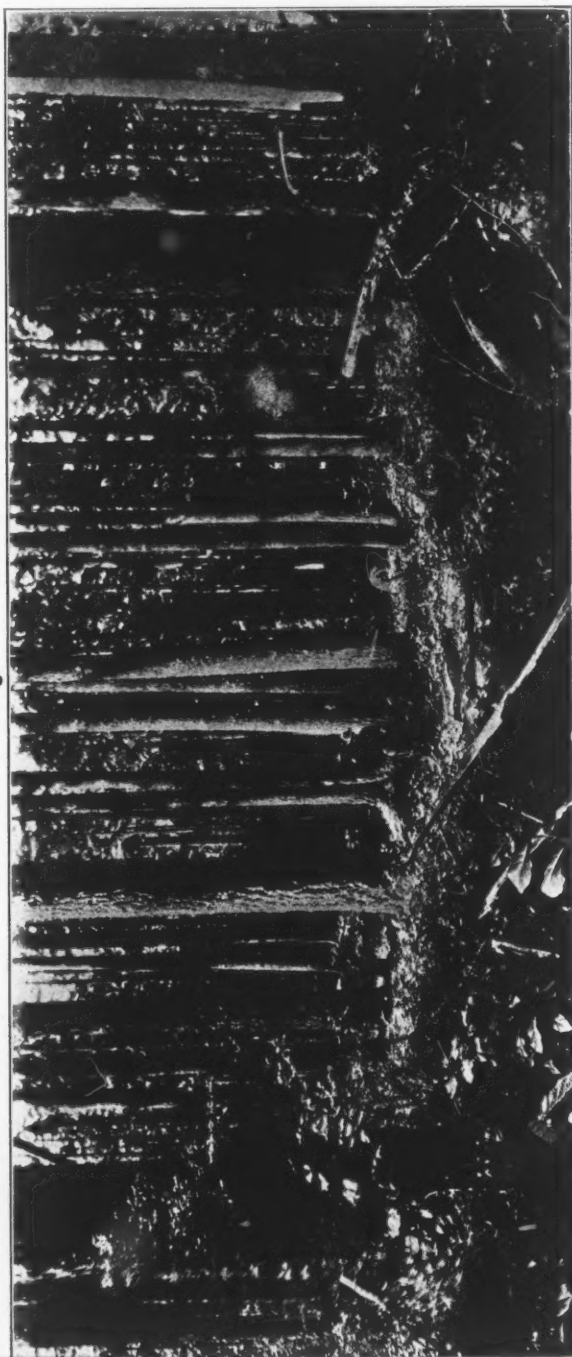


19. On the back of this picture appears the following: East Line Sec. 20, T. 4 North, Range 3 W. Looking North.
[Endorsed] No. 19, Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-19. Received March 28, 1914. F. D. Monckton, Clerk.



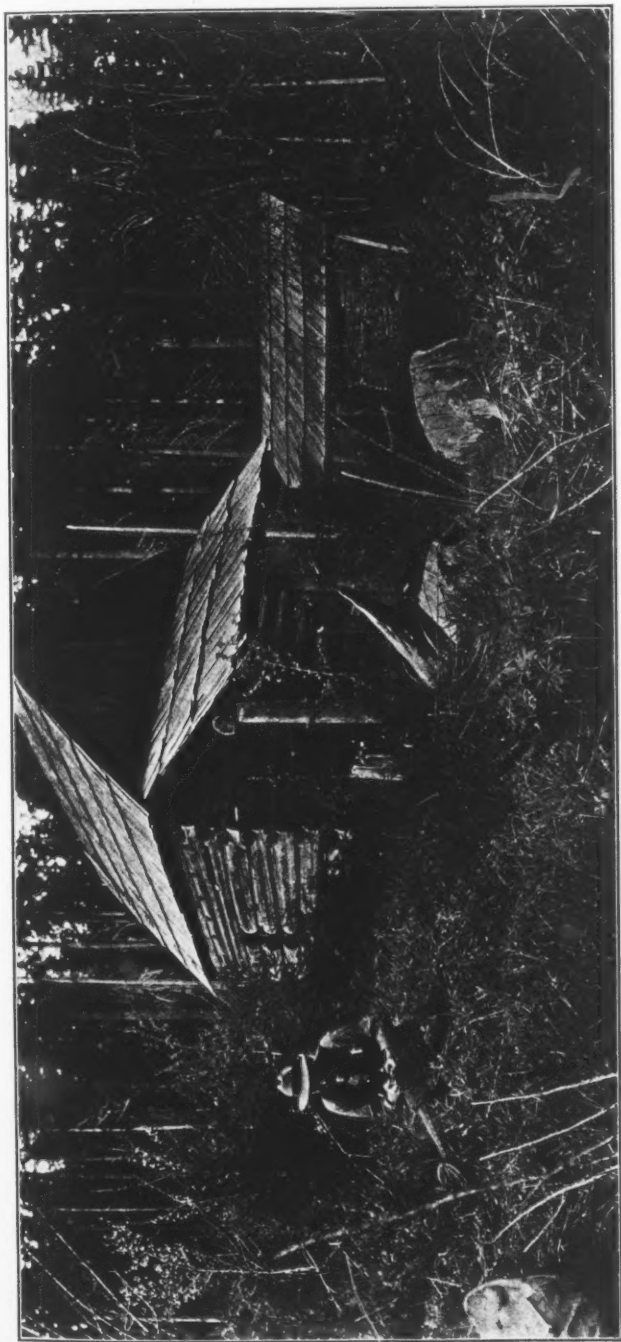
20. On the back of this picture appears the following: No. 1/4 Sec. 8, T. 4 N., R. 3 W. Looking NW. Showing timber.

[Endorsed] No. 20. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-20. Received March 28, 1914. F. D. Monckton, Clerk.



21. On the back of this picture appears the following: Taken from $W\frac{1}{2}$ of $NW\frac{1}{4}$ Sec. 9, T. 4 N., R. 3 W. Lewis claim.

[Endorsed] No. 21. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-21. Received March 28, 1914. F. D. Monckton, Clerk.

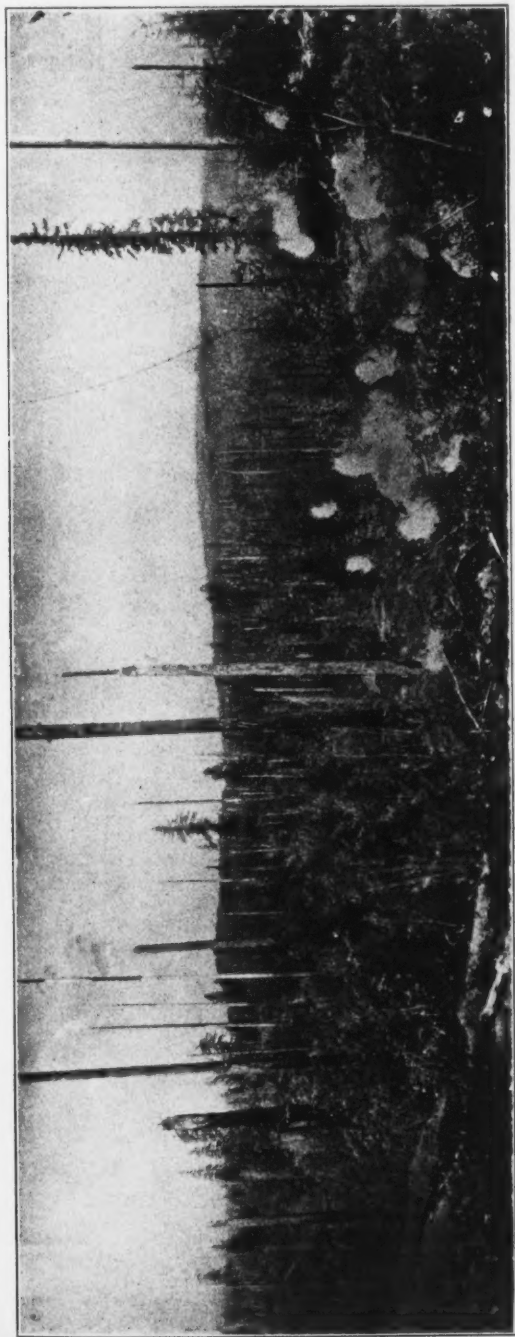


22. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 22, T. 4 N., R. 3 W. Hd. Jacob T. Schlicht.
[Endorsed] No. 22. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-22. Received March 28, 1914. F. D. Monckton, Clerk.



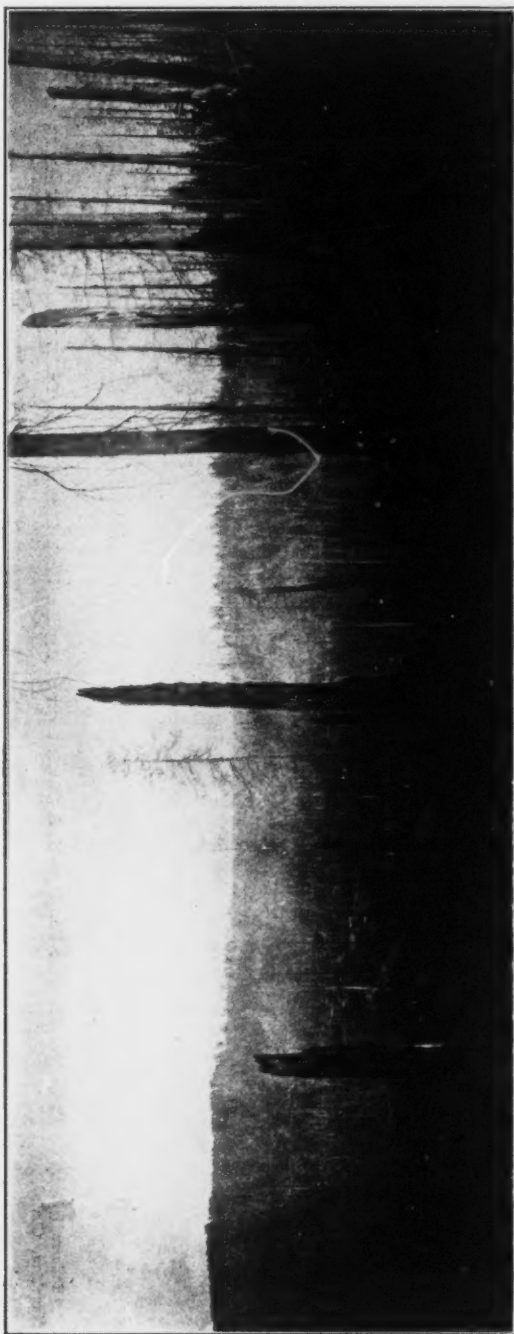
23. On the back of this picture appears the following. Cabin of F. W. Floater, NE $\frac{1}{4}$ Sec. 19, T. 4 N., R. 3 W. Suit filed—1908.

[Endorsed] No. 23. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-23. Received March 28, 1914. F. D. Monckton, Clerk.



24. On the back of this picture appears the following: Taken from south line Sec. 24, T. 4 N., R. 3 W. Looking N & E. Lands have been logged off.

[Endorsed] No. 24. Defts, Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-24. Received March 28, 1914. F. D. Monckton, Clerk.



25. On the back of this picture appears the following: Taken from SW $\frac{1}{4}$ Sec. 14-4 N-3 W—Looking N and NE.
Logged off.

[Endorsed] No. 25, Defts, Ex. 273, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts, Ex. 273-25, Received March 28, 1914, F. D. Monckton, Clerk.



26. On the back of this picture appears the following:

$\frac{20}{21}$ / $\frac{29}{28}$

Looking North bet. Secs. 20 and 21-7 S. 7 W.

[Endorsed] No. 26, Defts. Ex. 273, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-26. Received March 28, 1914. F. D. Monckton, Clerk.



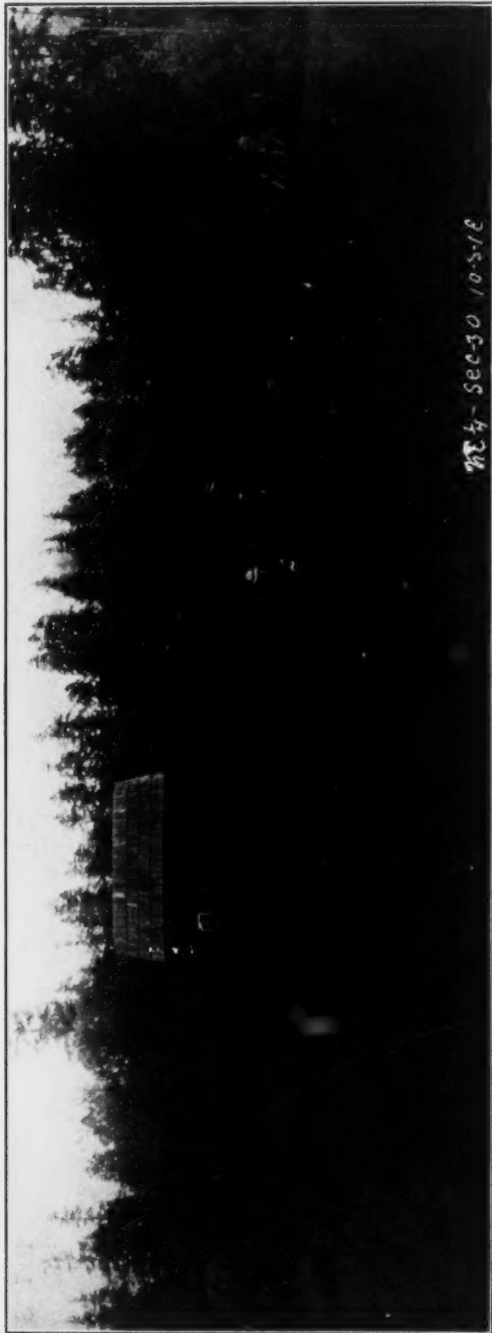
27. On the back of this picture appears the following: View taken from near center of Section 2, T. 10 S., R. 3 E., looking NE. Taken from S. W. Corner of NE $\frac{1}{4}$ looking N & E.

[Endorsed] No. 27. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-27. Received March 28, 1914. F. D. Monckton, Clerk.



28. On the back of this picture appears the following. Timber picture of Barclay's claim. NE $\frac{1}{4}$ Sec. 30, 10 S., R. 1 E.

[Endorsed] No. 28. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-28. Received March 28, 1914. F. D. Monckton, Clerk.



NE 1/4 Sec 30 10-5-18

29. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 30, T. 10 S., R. 1 E. Showing abandoned improvements on the W. L. Barclay claim.

[Endorsed] No. 29. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-29. Received March 28, 1914. F. D. Monckton, Clerk.

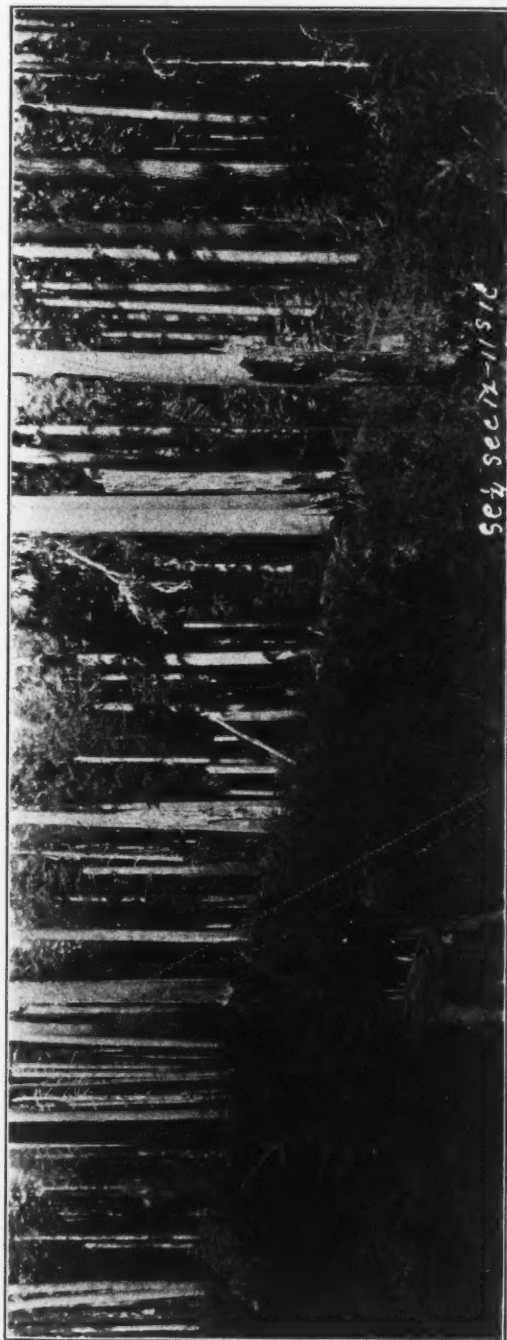


8 1/2 x 11 S. 12-S-15

C.W.K.

30. On the back of this picture appears the following: Timber picture taken near center of S1/2 of S1/2 Sec 4, T 12 S., R. 1 E. Looking SW.

[Endorsed] No. 30. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-30. Received March 28, 1914. F. D. Monckton, Clerk.



31. SE $\frac{1}{4}$ Sec. 12-11 S., 1 E.

[Endorsed] No. 31. Defs. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 273-31. Received March 28, 1914. F. D. Monekton, Clerk.

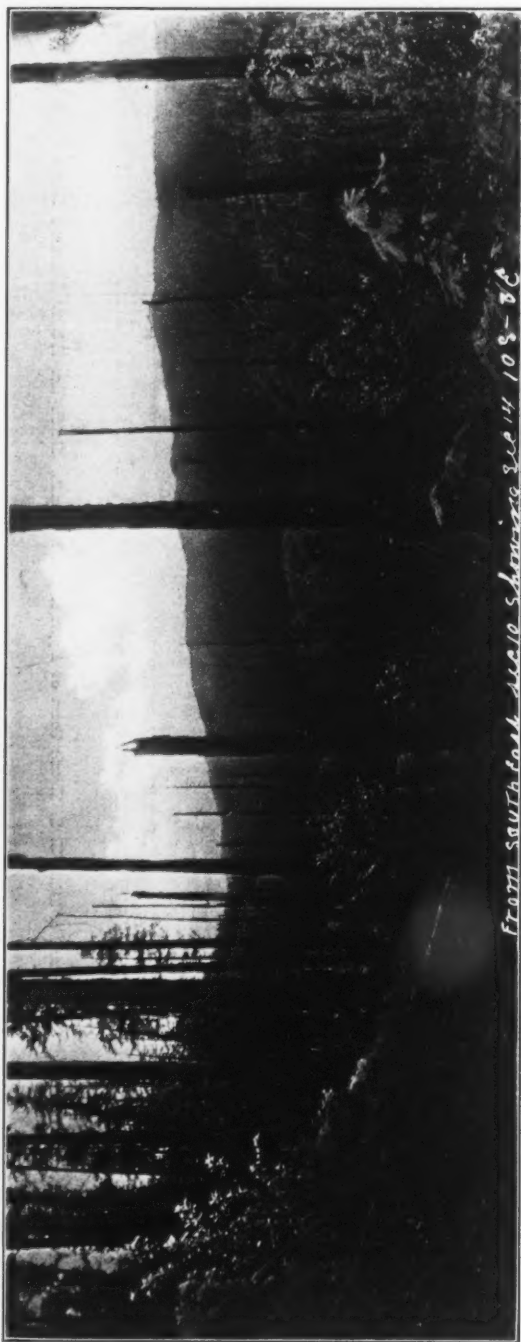
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Pl. to Sec 15-10-11

32. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 28, T. 10 S., R. 1 E. Showing buildings and field abandoned.

[Endorsed] No. 32. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-32. Received March 28, 1914. F. D. Monckton, Clerk.



33. On the back of this picture appears the following: Looking SE from the corner of 10-11-14 and 15, T. 14 S., R. 3 E.

[Endorsed] No. 33. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-33. Received March 28, 1914. F. D. Monckton, Clerk.



34. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 18, 10 S., R. 4 E. Showing remains of cabin and heavily timbered character of land.

[L. Jorsed] No. 34. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-34. Received March 28, 1914. F. D. Monckton, Clerk.



S 1/2 Sec 8; of Sec 10 S 4

35. On the back of this picture appears the following: S $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 6, T. 10 S., R. 4 E. Showing lands logged off. Looking North and West.

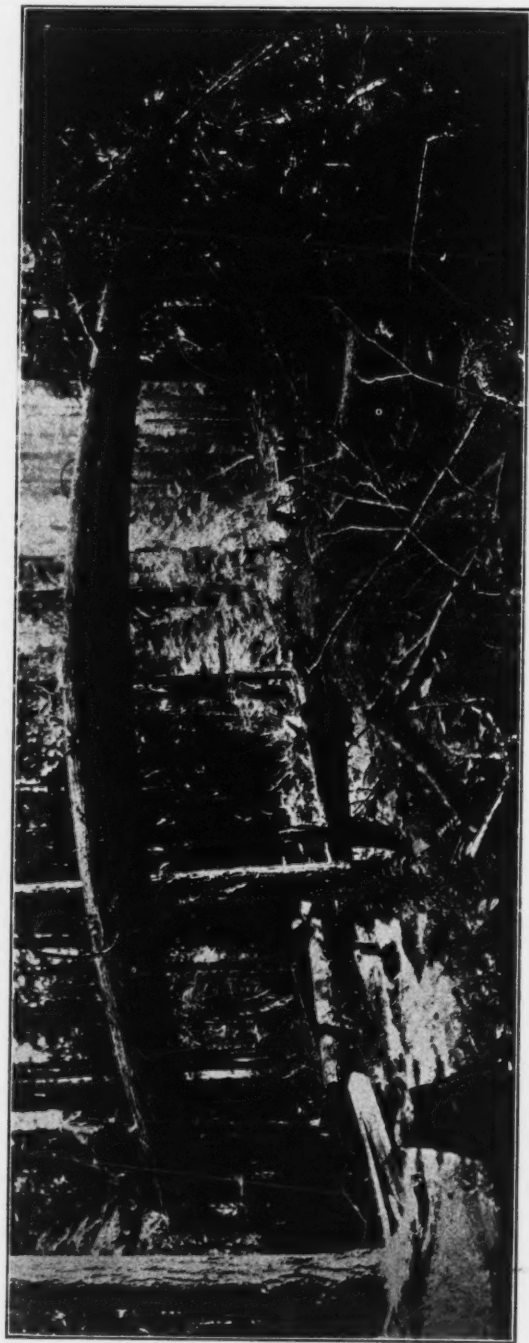
[Endorsed] No. 35. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-35. Received March 28, 1914. F. D. Morekton, Clerk.

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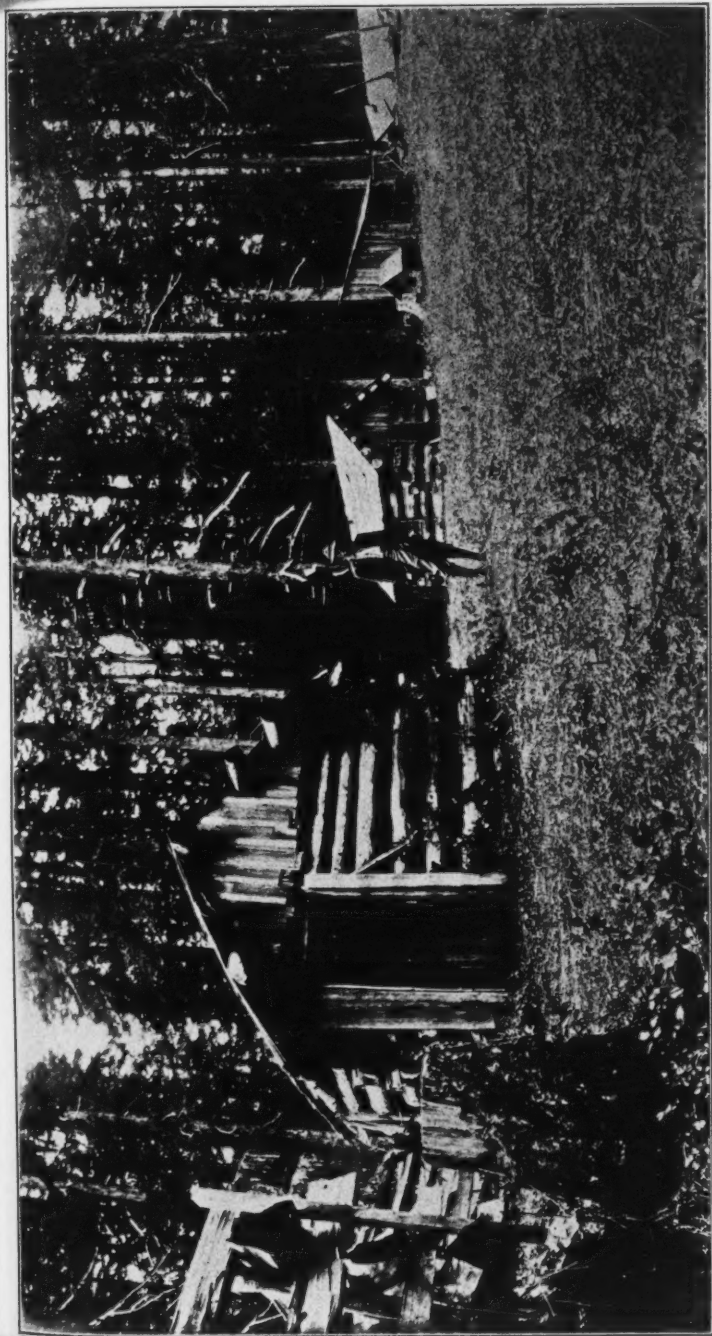
36. On the back of this picture appears the following: 2 tallies north of corner 25, 26, 35 and 36. Looking northeast, showing right of way of the Chapman logging road, partly cleared.

[Endorsed] No. 36. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-36. Received March 28, 1914. F. D. Monekton, Clerk.

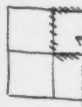


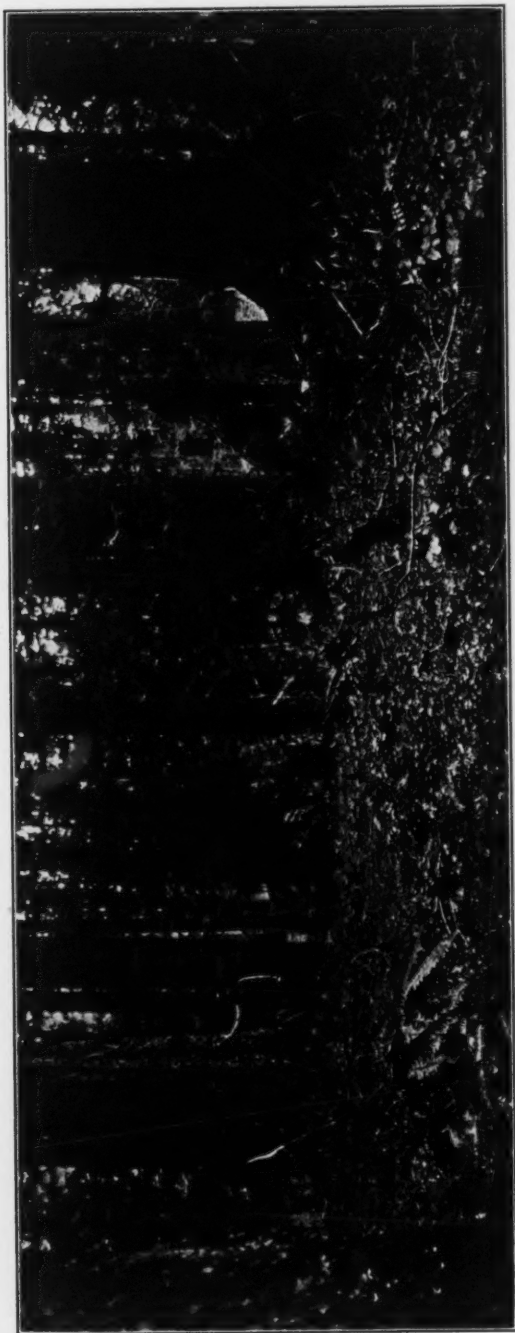
37. On the back of this picture appears the following: Taken from the east line of Sec. 26, T. 4 N., R. 3 W., looking east and south. 2 tallies north of cor. 25, 26, 35, 36.

[Endorsed] No. 37. Defs. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defs. Ex. 273-37. Received March 28, 1914. F. D. Monckton, Clerk.



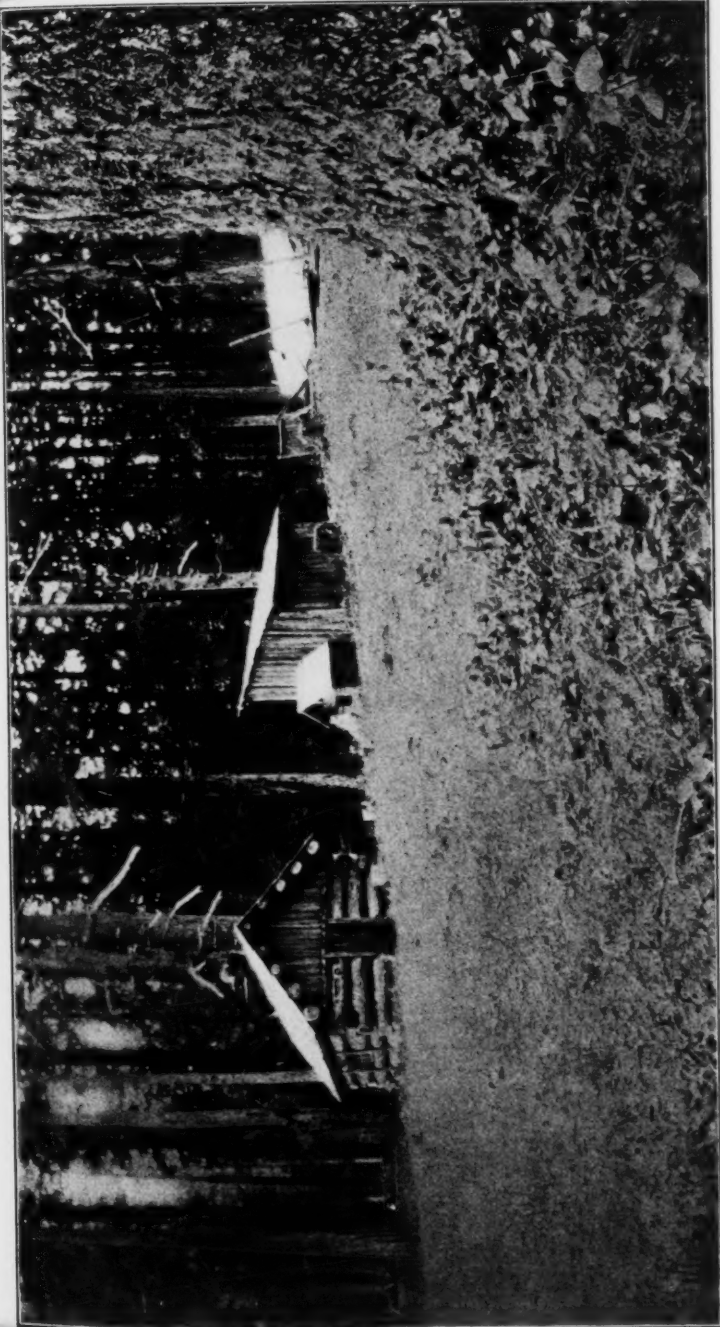
38. On the back of this picture appears the following: "A" SE $\frac{1}{4}$ Sec. 34-3 S., 2 E. Homestead of Otto Herring. Filed April 4, 1905. Pat. Mch. 17/08.
 Photo taken Apr. 27th, 1912, by C. W. Kempton, Field Examiner. Report of J. Akinser, Field Examiner 2/28/1912.
 "No land in cultivation—not occupied—2 log houses 12 x 14—barn—value \$10. About 12 acres slashed—a great deal of fine timber on this claim—Valuable for timber only."





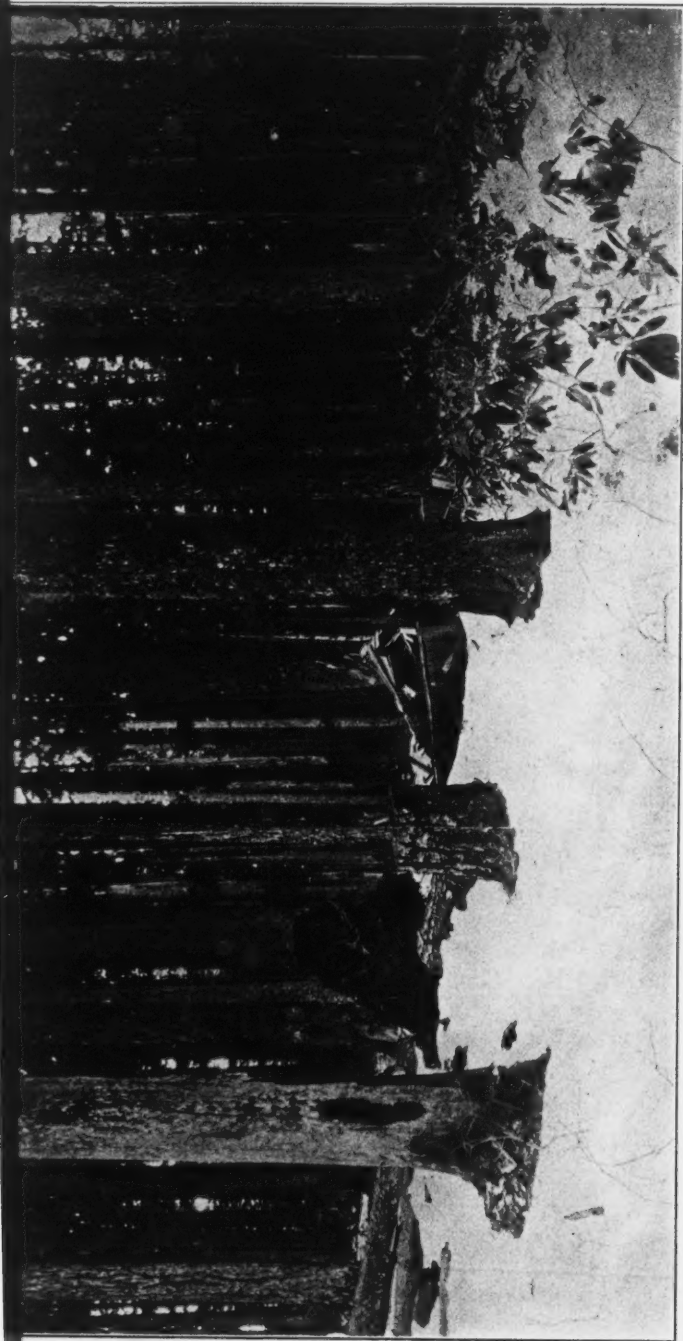
39. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 34, 8 S. 2 E. See picture "A" (No. 38) for details. Hd. of Otto Herrling.

[Endorsed] No. 39. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273.39. Received March 28, 1914. F. D. Monckton, Clerk.



40. On the back of this picture appears the following: See Picture "A" (No. 38). SE¼ Sec. 34-8 S. 2 E.

[Endorsed] No. 40. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-40. Received March 28, 1914. F. D. Monckton, Clerk.

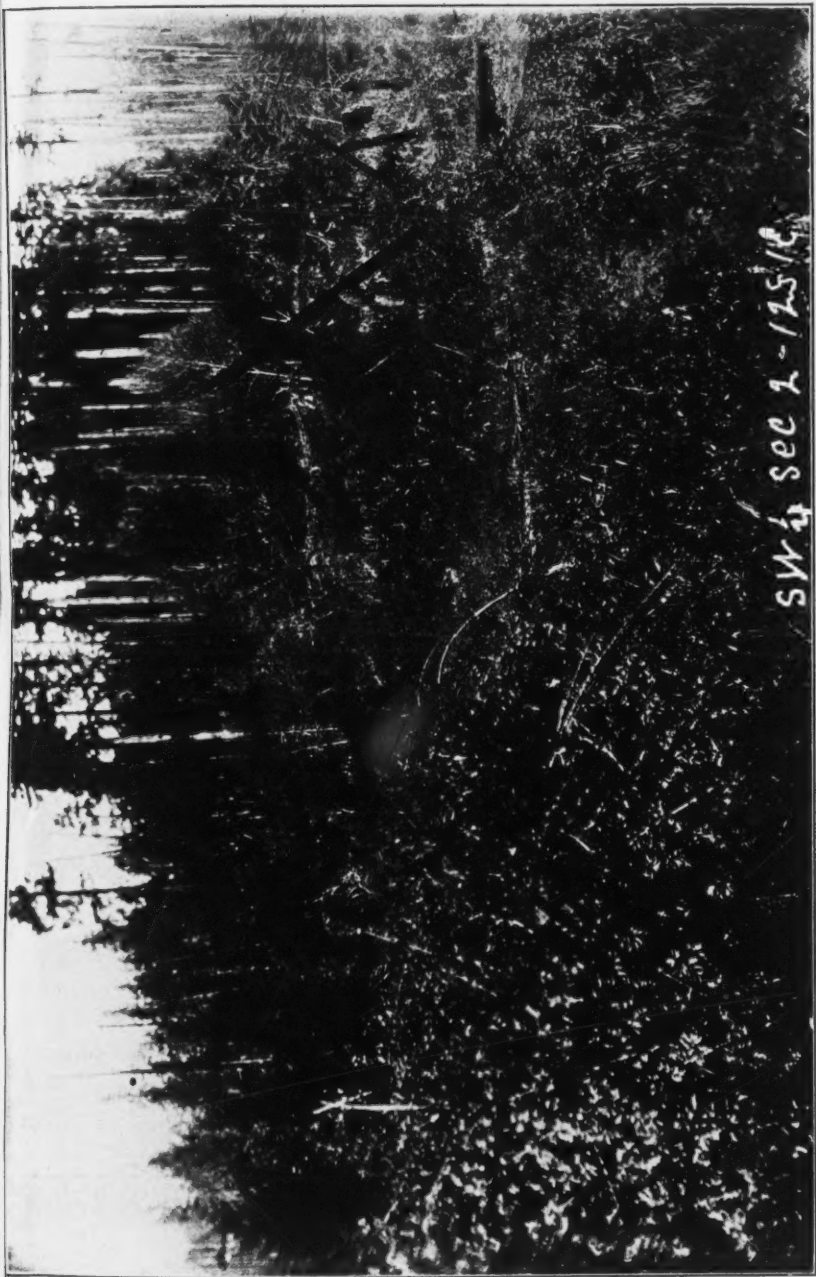


41. On the back of this picture appears the following: Enlarged view of S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW-Sec 2. Tp. 8 S., 8 W. Looking S. E. Homestead of Frank P. Farrington. Filed 3/28/00. Patent 4/6/03. Commuted entry. Taken April 9, 1912, by C. W. Kempton, Field Examiner. Synopsis of report of C. W. Kempton, Field Examiner O&C RR. Co. Feb. 29, 1912. "Land not occupied—not cultivated or cleared. No improvements except old house destroyed by a tree having fallen on it. Timber will run from 8 to 10 million bd. ft. on this claim." (Stuart)

[Endorsed] No. 41. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-41. Received March 28, 1914. F. D. Stoughton, Clerk.

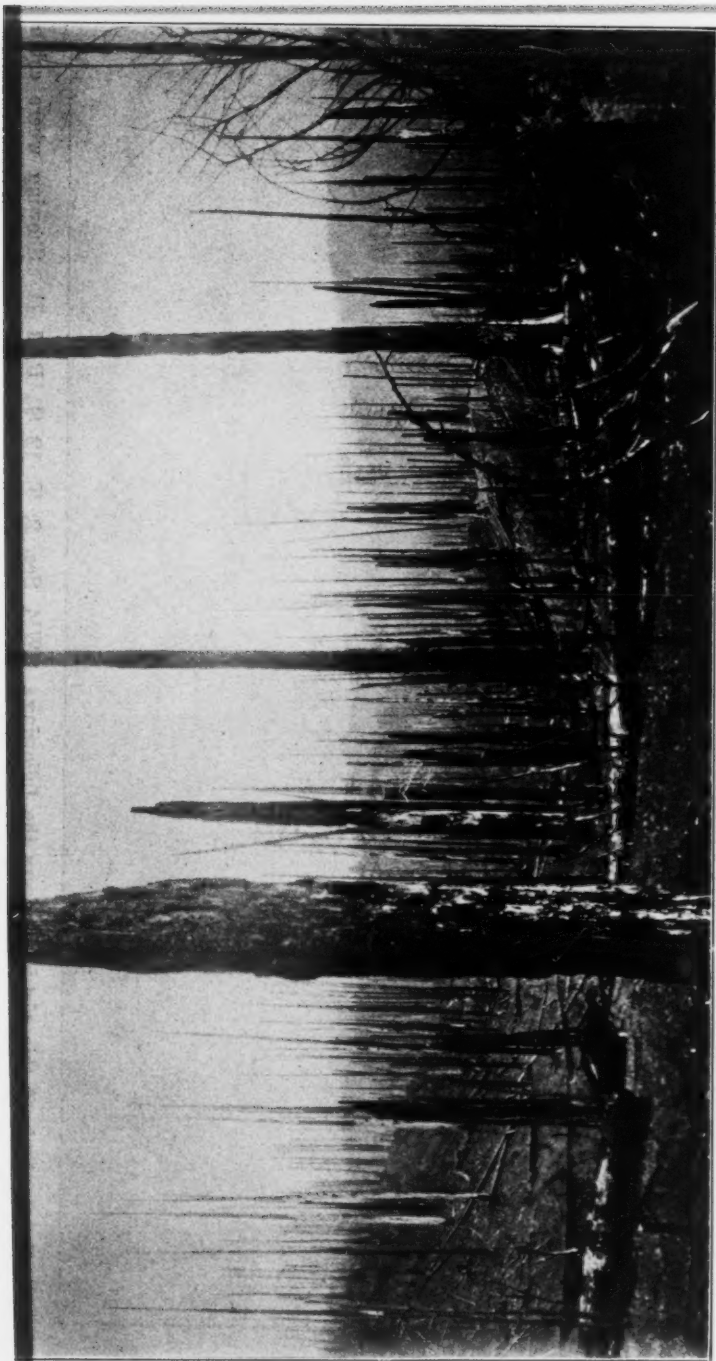


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SW $\frac{1}{4}$ sec 2-12516

42. On the back of this picture appears the following: SW $\frac{1}{4}$ Sec. 2, T. 12 S., R. 1 E. Showing where cabin and other improvements were located. Cabin burned down.



43. On the back of this picture appears the following: Sec. 8, 8 S. 7 W. NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 8. Looking towards H. W. Jones homestead. Filed 1/24/10, unpatented. View looking SE. Showing character of land in Sec. 8. Taken 4/10/12, by C. W. Kempton, Field Examiner O&C RR. Co.

[Endorsed] No. 43. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-43. Received March 28, 1914. F. D. Stoneham, Clerk.

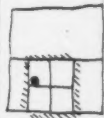


SL-751-sec-1251E

44. On the back of this picture appears the following: S $\frac{1}{2}$ of S $\frac{1}{2}$ Sec. 4, T. 12 S., R. 1 E. Looking NE. Show-

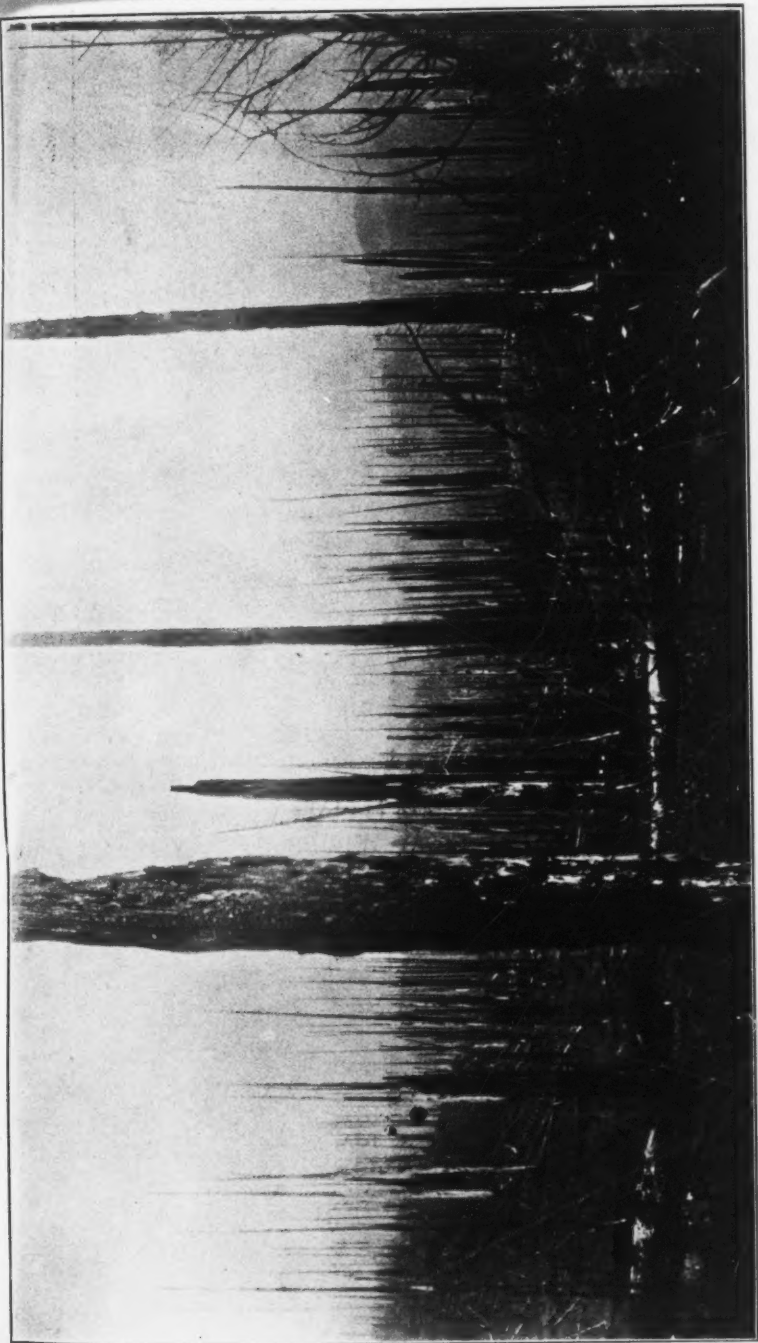


45. On the back of this picture appears the following: $S\frac{1}{2}$ NW. $N\frac{1}{2}$ S W. Sec. 2, 8 S., 8 W. Hd. of Frank P. Farrington. Filed 3/28/00. Looking SE. Taken Apr. 9/1912. C. W. Kempton. Report by C. W. Kempton, Field Examiner, 2/29/12, O&C occupied—no improvements except old house destroyed by tree falling on it. No cultivation—no clearing. Timber to 3 million ft. to the 40 acres or 8 to 10 million to the $\frac{1}{4}$ sec. or entry.



Pat. 4/8/03.
RR. Co. Not
will scale 2

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46. On the back of this picture appears the following: View of Sec. 8, 8 S, 7 W. Taken from NE $\frac{1}{4}$ of NW $\frac{1}{4}$ looking towards H. W. Jones homestead. View taken Apr. 10, 1912, by C. W. Kempton, field examiner O&C RR. Co. Looking SE. Showing "burn" and character of land in Sec. 8.

47. SE $\frac{1}{4}$ Sec. 30, 10
S., 1 E.

[Endorsed] No. 47, Defts. Ex.
273. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 273-47, Received March
28, 1914. F. D. Monckton, Clerk.

Sec 30 10-S-10

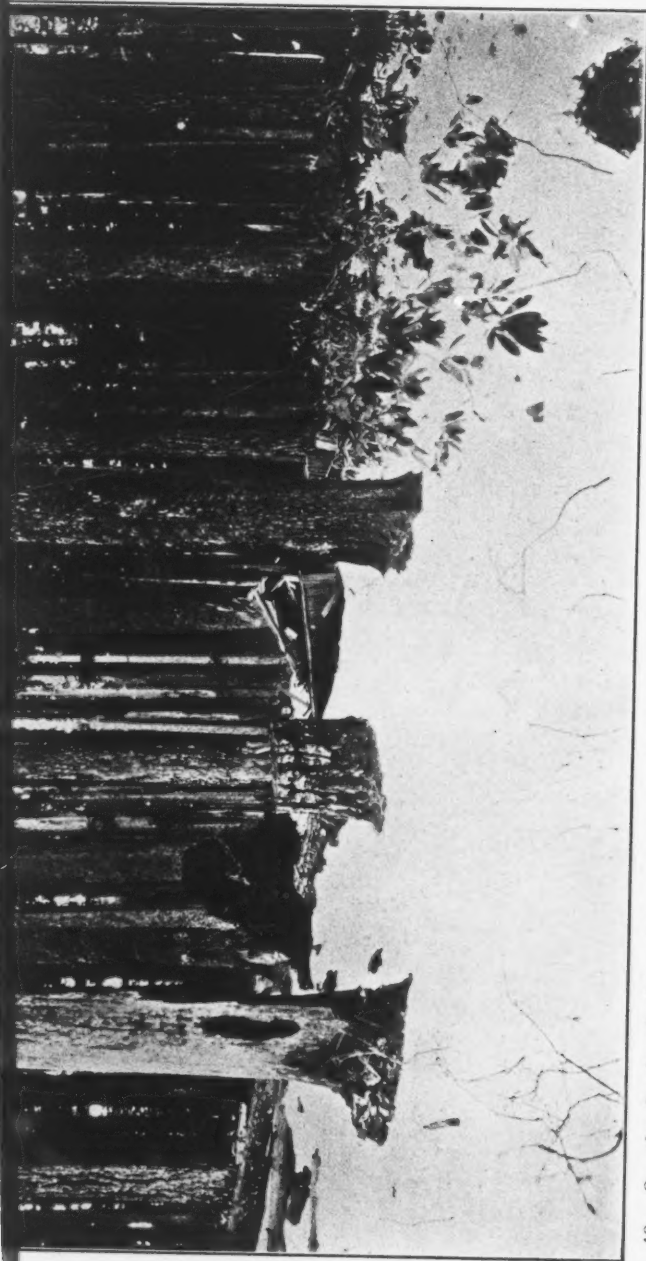
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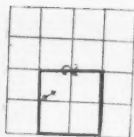
Timber view NW 1/4 Sec 34 T11S R2E W.M. July

E BOUND
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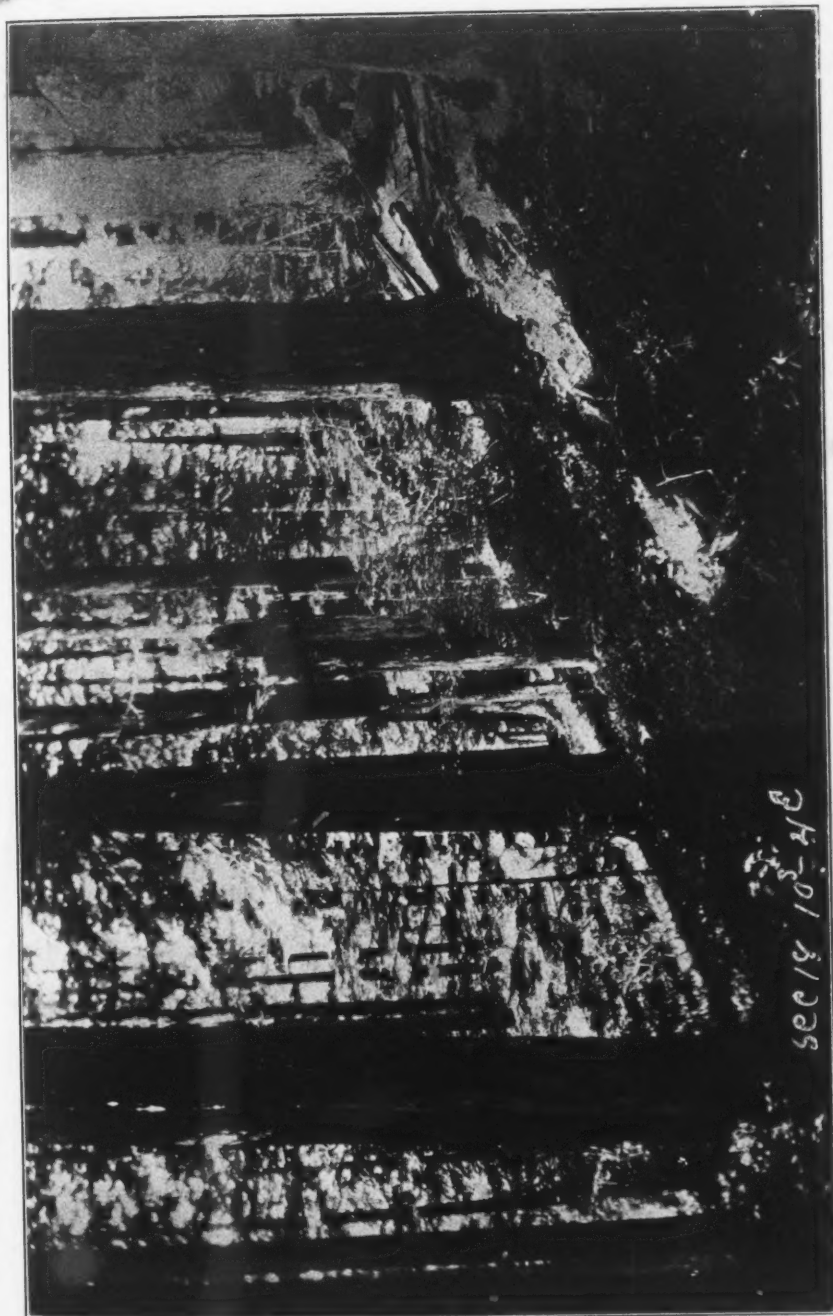
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49. On the back of this picture appears the following: S $\frac{1}{2}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$, 8 S., 8 W. Homestead of Frank P. Farrington. Filed Meh 28, 1900. Patented April 6, 1903. Sold in Meh. 1904 for \$1600. Photo taken Apr. 9, 1912, by C. W. Kempton. View looking SE. Report of C. W. Kempton, field examiner, O&C RR. Co. 2/29/12. "Not occupied—no improvements except old house destroyed by tree falling on it—no cultivation—no clearing. Timber will run 8 to 10 million feet on this claim."



Manuscript. File 8. Derris. Ex. 273.49. Received March 28, 1914.



24-301 3/225
SEP 18 10 34 A

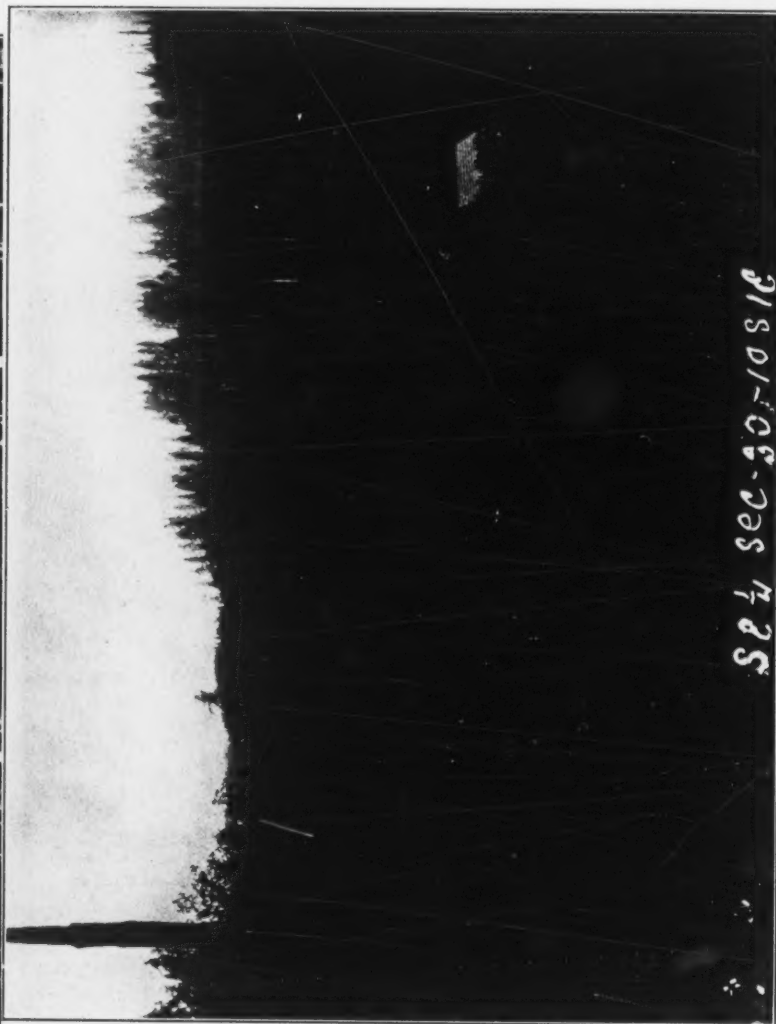
Looking Northwest Show

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51. On the back of this picture appears the following: W $\frac{1}{2}$ of NE. and E $\frac{1}{2}$ of NW Sec. 24, T. 10 S., R. 1. E. Looking S. W. W. H. Small. Showing improvements abandoned Sec. 24-10S-1E, W. II. Small Sec. 24-10S-1 E. E $\frac{1}{2}$ of NW. & W $\frac{1}{2}$ of NE.

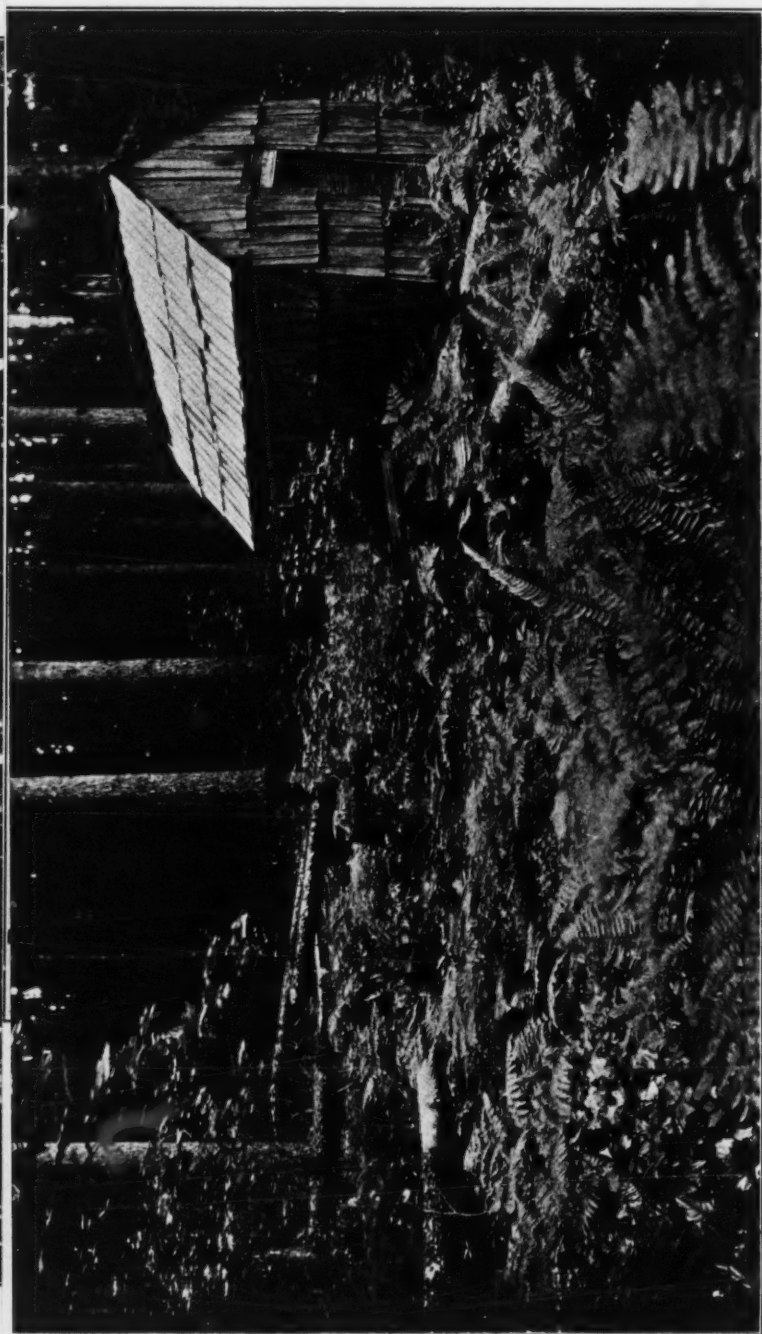
[Endorsed] No. 51. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-51. Received March 28, 1914. F. D. Monckton, Clerk.



52. SE $\frac{1}{4}$ Sec. 12, 10
S., 3 E.

[Endorsed] No. 52. Defts. Ex.
273. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit.
Defts. Ex. 273-52. Received March
28, 1914. F. D. Monckton, Clerk.

52 1/4 - sec. 12 - 10 S - 3 E.

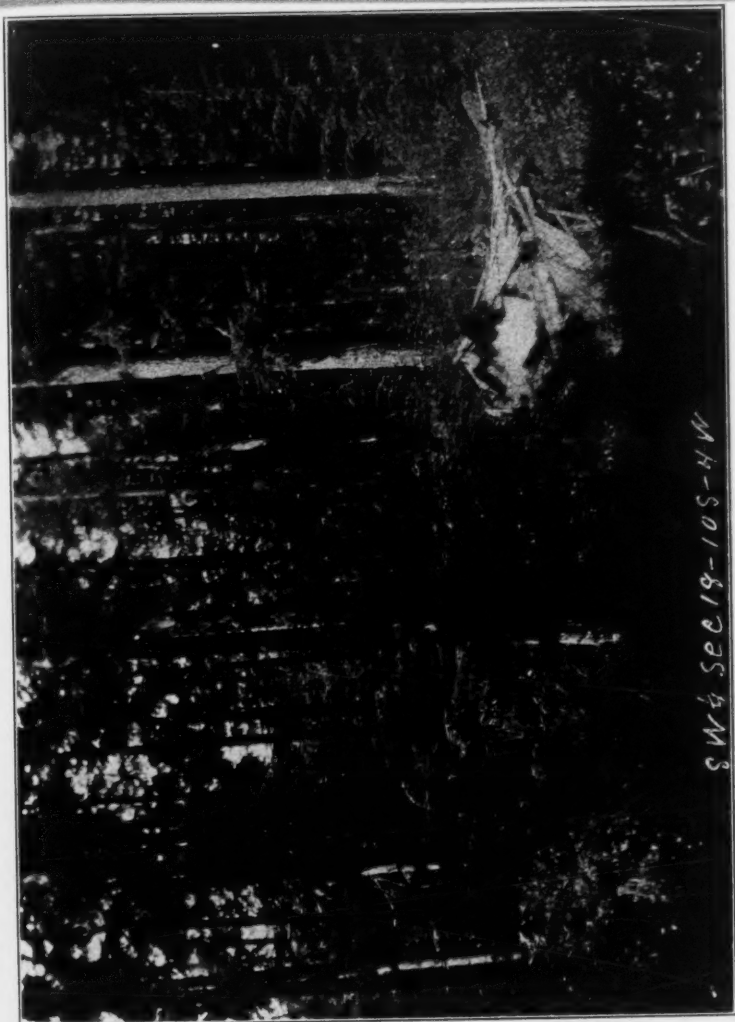


53. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 20, T 11 S., R. 2 E. Showing improvements of J. A. Weaver, entryman. Photo by C. W. Kempton July, 1912.

[Endorsed] No. 53. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals. Ninth Circuit. Defts. Ex. 273-53. Received March 28, 1914. F. D.

54. On the back of this picture appears the following: SW $\frac{1}{4}$ Sec. 18, T. 10 S., R. 4 E. Looking Southwest and showing remains of improvements.

[Endorsed] No. 54. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-54. Received March 28, 1914. F. D. Monckton, Clerk.



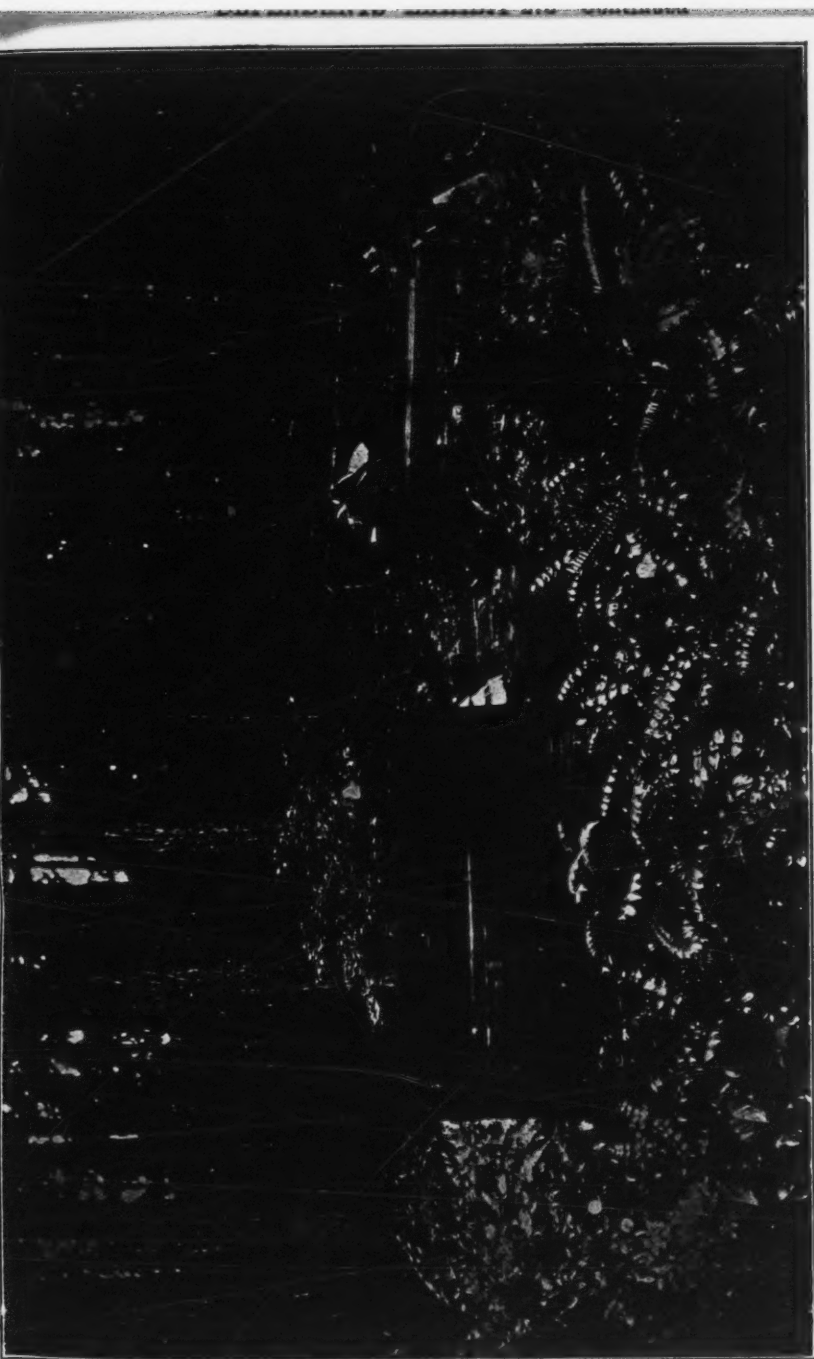
SW $\frac{1}{4}$ Sec 18-10S-4E



55. On the back of this picture appears the following: SW $\frac{1}{4}$ Sec. 28, 11 S., R. 2 E., W. M. Showing homestead improvements of Jas. H. Scott. Photograph by C. W. Kempton, July, 1912.

U. S. Circuit Court of Appeals, Ninth Circuit. D. C. No. 1711.

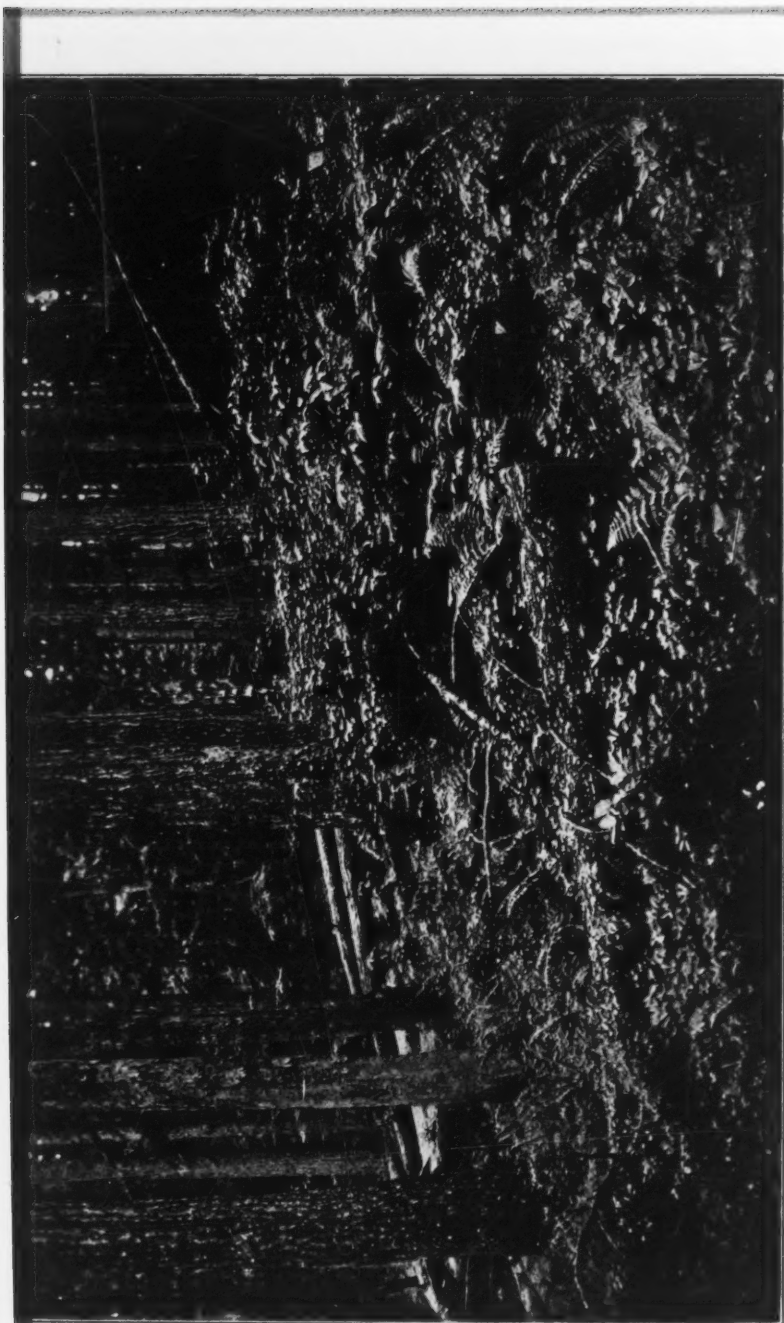
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56. On the back of this picture appears the following: SE-Sec. 28, T. 11 S. R. 2 E., W. M. Showing homestead improvements of Joe C. Bould. Photo by C. W. Kesseler. July 1919.

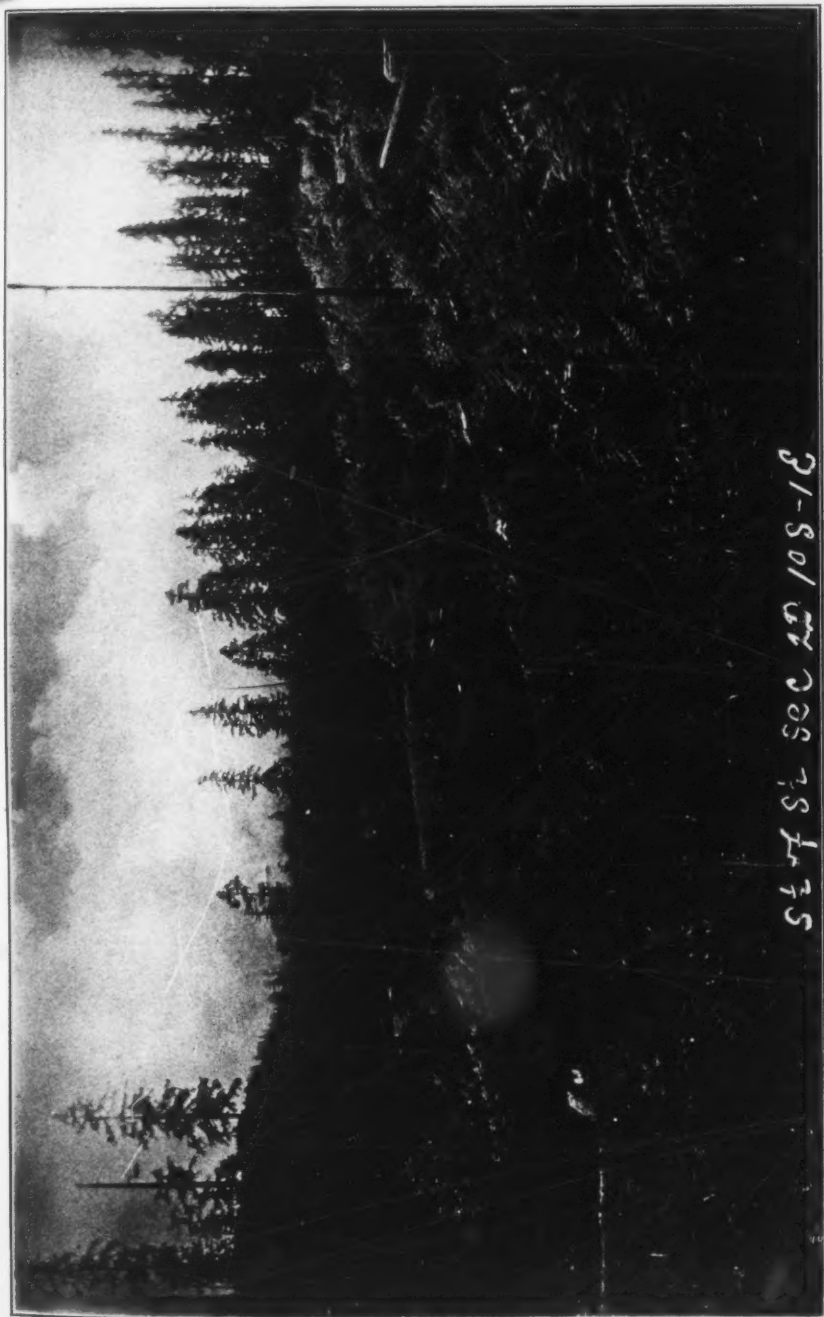
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E BOUND
L IN BOOK



57. On the back of this picture appears the following: SW-26-11 S. R. 2 E., W. M. Showing improvements of James Darcy. Photo by C. W. Kempton, July, 1912.

U. S. Circuit Court of Appeals, Ninth Circuit, Dockets, Ex. 273-57, Received March 28, 1914. F. D.



52 of 82 Sec 20 108-18

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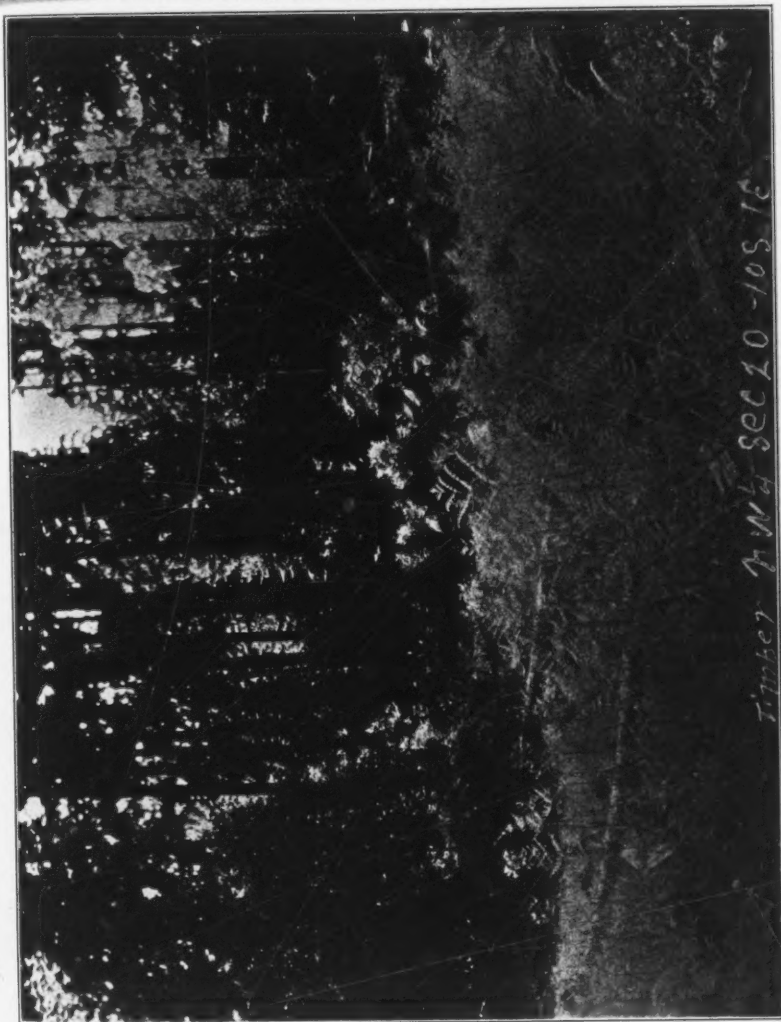
59. On the back of this picture appears the following: NW $\frac{1}{4}$ Sec. 12, 11 S.-1 E. Taken at $\frac{1}{4}$ corner looking N & East. Cabin just over the line on SW $\frac{1}{4}$.

[Endorsed] No. 59. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-59. Received March 28, 1914. F. D. Monckton, Clerk.

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60. Timber NW $\frac{1}{4}$ Sec.
20, 10 S., 1 E.

[Endorsed] No. 60, Defts. Ex.
273. Case No. 2400—U. S. Circuit
Court of Appeals, Ninth Circuit,
Defts. Ex. 273-60. Received March
28, 1914. F. D. Monckton, Clerk.



Timber NW $\frac{1}{4}$ Sec 20 - 10 S. 1 E.



for new 1/4 Sec-20-103-1E

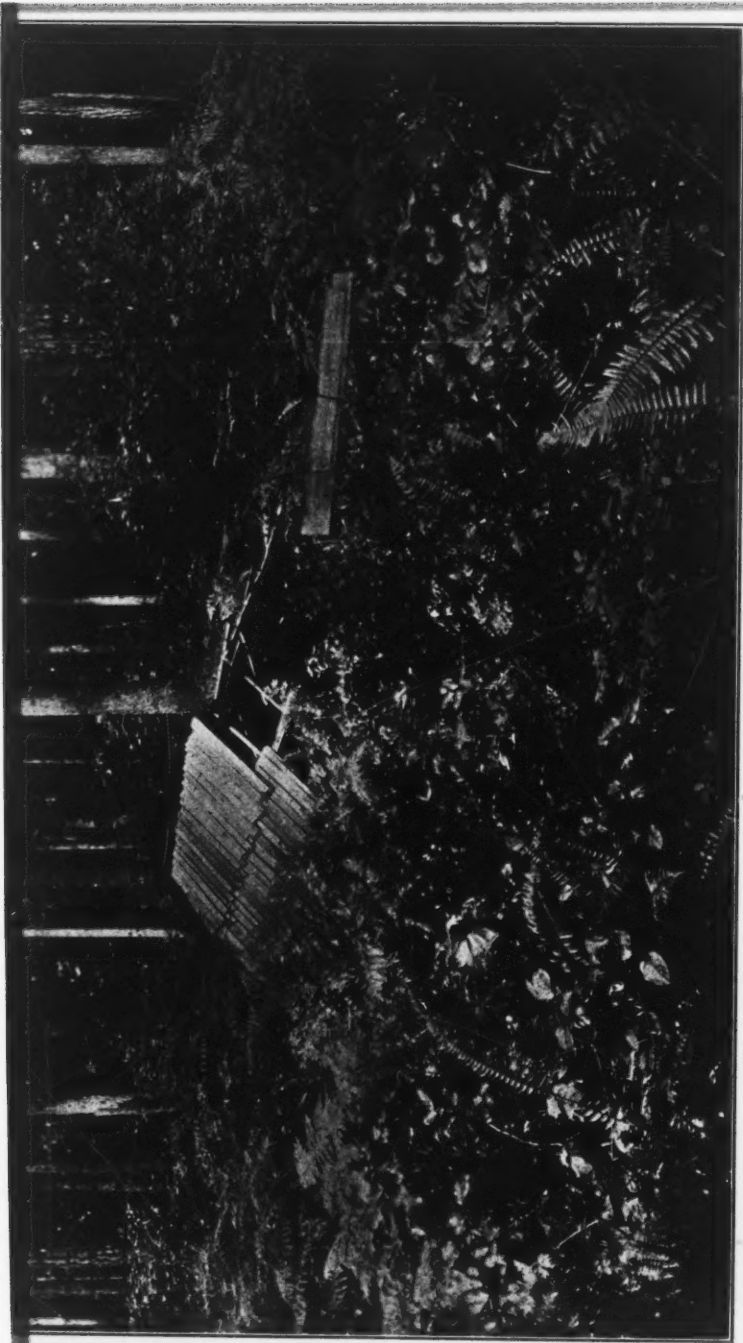
61. Northwest 1/4 Sec. 20-10 S-1 E.

[Endorsed] No. 61. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-61. Received March 28, 1914. F. D. Monckton, Clerk.

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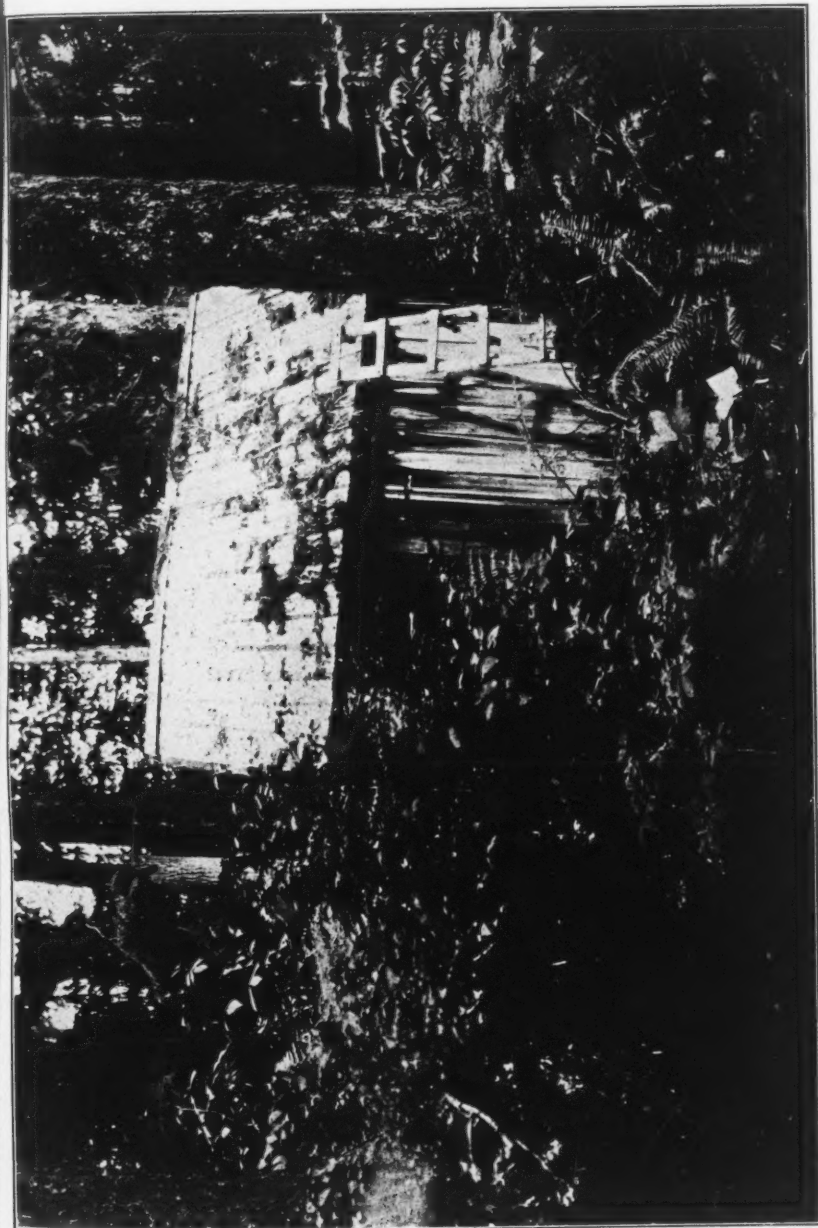
62. On the back of this picture appears the following: NE $\frac{1}{4}$ Sec. 32-11 S. R. 2 E. Showing improvements of Fred W. Schultz, entryman. July, 1912. Photograph by C. W. Kempton.



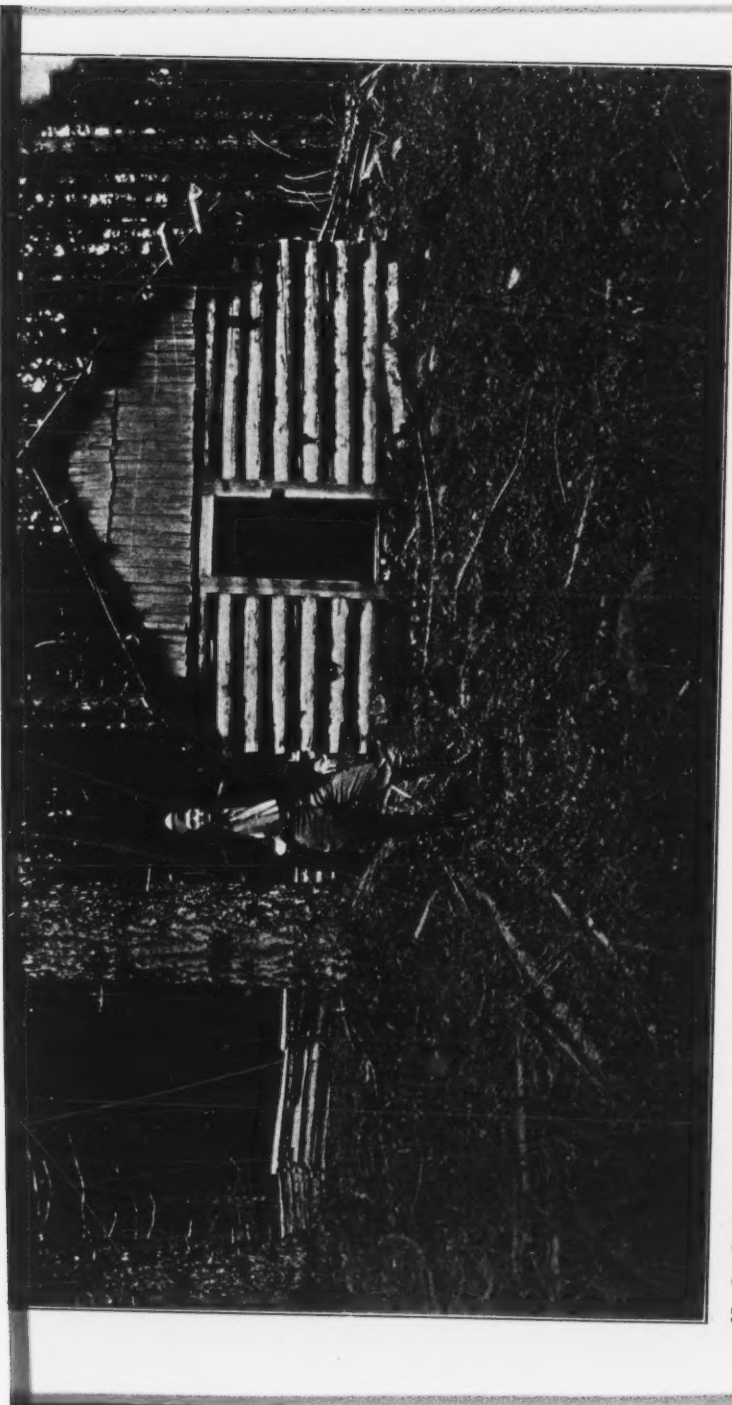
63. On the back of this picture appears the following: SW $\frac{1}{4}$ of Sec. 20, T. 11 S. R. 2 E., W. M. Showing homesteader's improvements. C. C. Parker, entryman. Taken July, 1912.

[Endorsed] No. 63. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-63. Received March 28, 1914. F. D. Monckton, Clerk.

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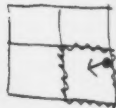


64. On the back of this picture appears the following: NE-34-11 S., R. 2 E., W. M. Showing improvements of



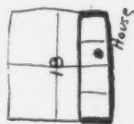
65. On the back of this picture appears the following: SW $\frac{1}{4}$ Sec. 34, 8 S., 2 E. Leon D. Hedges homestead. View looking north. Taken by C. W. Kempton, Apr. 27, 1912. J. Akinser's report of Feb. 28, 1912: "Not occupied—vacant last 7 years. Log house 14 x 16, value \$5.00. None in cultivation—1 acre partly slashed. Timber will run about 100 good saw trees of average size to the acre—valuable only for timber.

[Endorsed] No. 65. Defis. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defis. Ex. 273-65. Received March 28, 1914. F. D. Monahan, Clerk.



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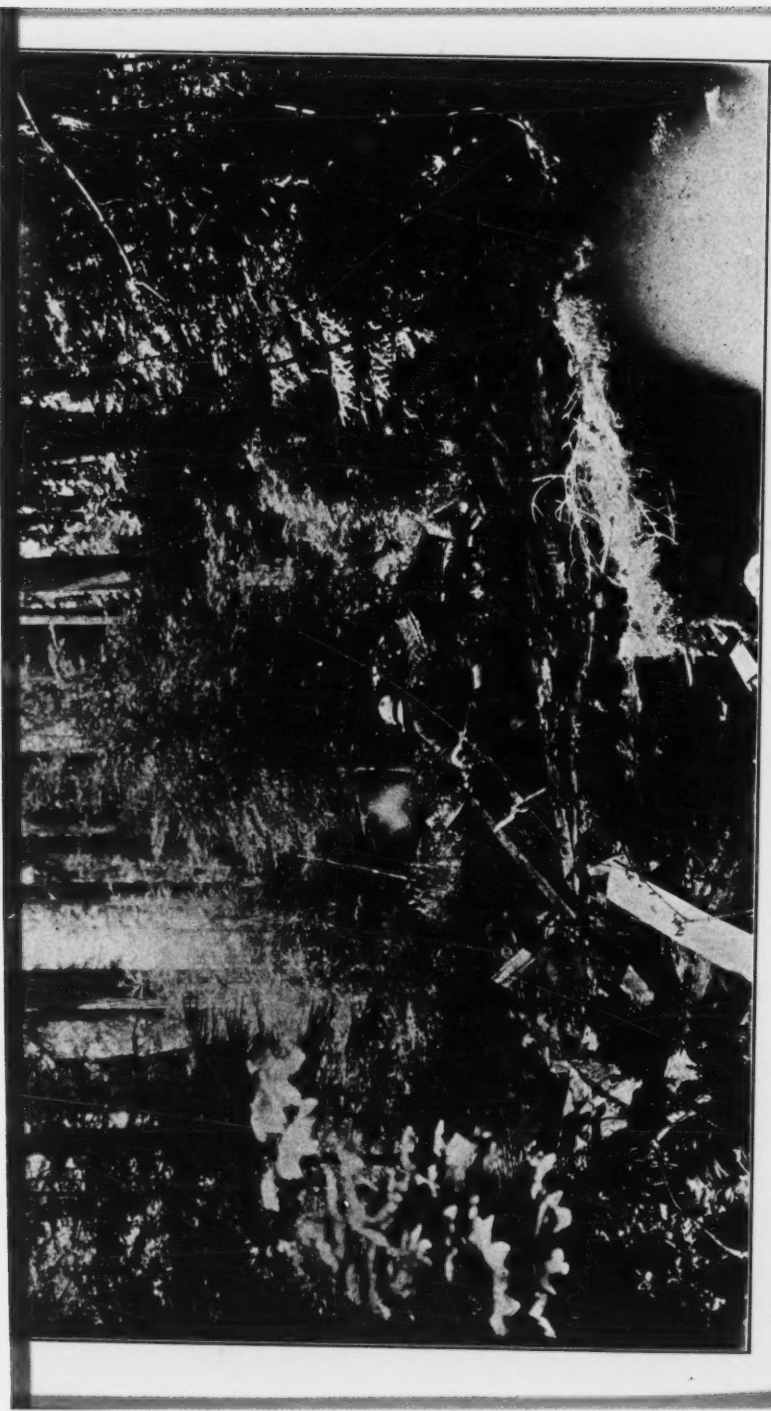
66. On the back of this picture appears the following: Character of improvements made on homestead claim of Alfred Haldeman, S $\frac{1}{2}$ SE $\frac{1}{4}$, and S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 18, Tp. 7 S., R. 6 W., W. M. Filed Nov. 20, 1900. Patented May 13, 1904. Sold in April 19, 1904—before patent issued for \$895.21. Taken Apr. 2, 1912. C. W. Kempton.



Report by C. W. Kempton, Field Examiner, 4/2/12, O&C RR. Co.: House 12 x 12, barn 12 x 14. Not occupied—no clearing—no cultivation. All good timber—most value for timber.

[Endorsed] No. 66. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 273-66, Received March 28, 1914. F. D. Monckton, Clerk.





67. On the back of this picture appears the following: SE-10, T. 10 S., R. 3 E., W. M. Showing homestead improvements. Taken by C. W. Kempton, May 30, 1912.

(Endorsed) No. 67. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-67. Received March 28, 1913. F. D.

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68. On the back of this picture appears the following: NW $\frac{1}{4}$ Sec. 10, T. 10 S., R. 3 E. Showing improvements fallen down and overgrown with fern and brush. W. J. Wiggs claim. Cabin Sec. 10-10S-3 E. W. J. Wiggs claim. NW $\frac{1}{4}$

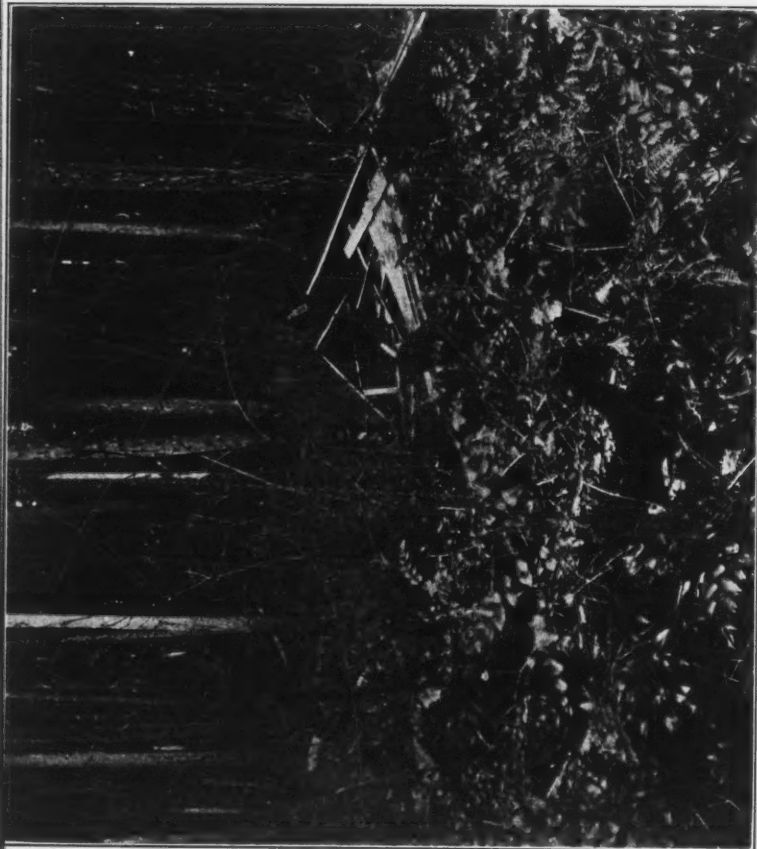
[Endorsed] No. 68. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-68. Received March 28, 1914. F. D. Monckton, Clerk.

69. On the back of this picture appears the following: NE¼ Sec. 10, 8 S., 7 W. Louis Pfandhoefer Hd. Filed 5/14/00. Patent. 4/6/03.

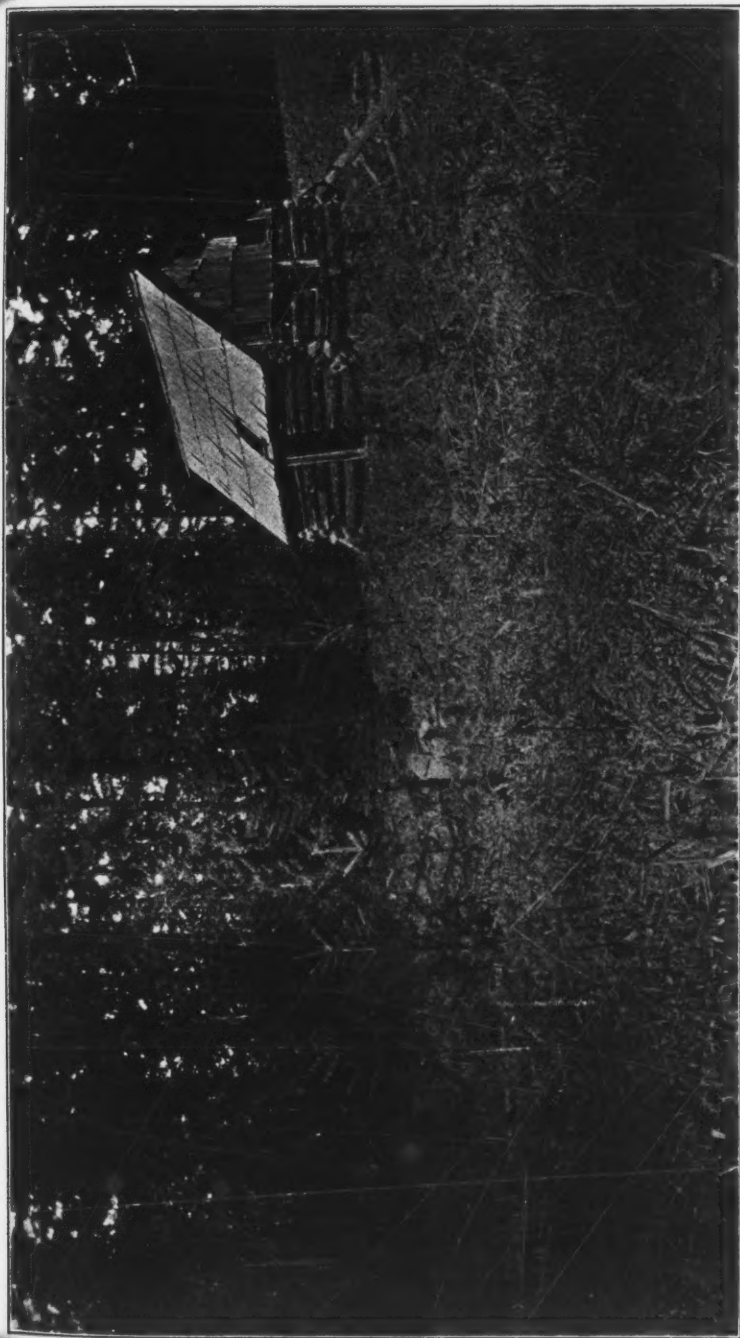


Taken Apr. 10, 1912. Sold 5/15/03 for \$1800. Looking S. E. Report of C. W. Kempton, Field Examiner O&C RR. Co. 2/6/12: Not occupied—no improvements—land rough—cut by several ravines—very steep and rough. Timber on place suitable for piling. Entry made for timber. (Note. On Apr. 10, 1912, Kempton, after diligent search, found this old broken down house on NW of NE—no other impvts. found). Stuart.

[Endorsed] No. 69, Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-69. Received March 28, 1914. F. D. Monckton, Clerk.



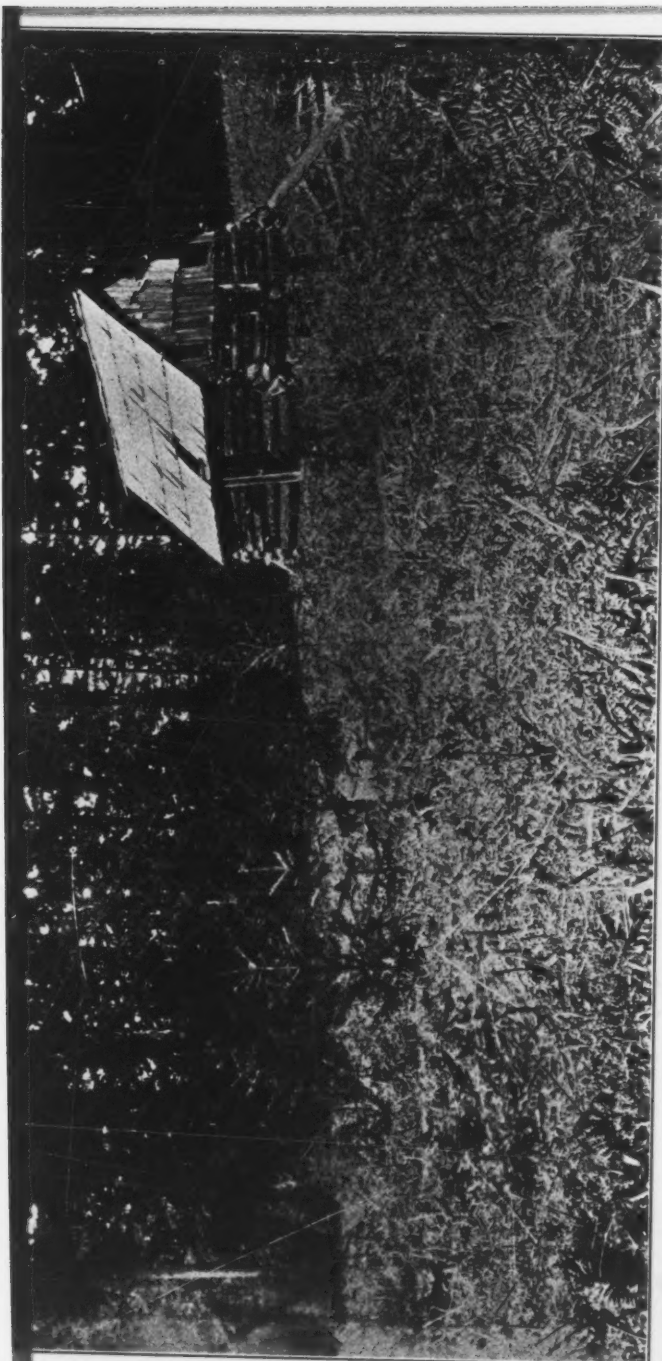
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70. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 10, 8 S., 7 W. Patented 2/23/92. Taken April 10, 1912, by C. W. Kempton, field examiner O&C RR. Kempton, 2/6/12: "Not occupied—no improvements except old log house, badly



Homestead of Ole Nielsen. Filed 3/4/90. Co. Looking NW. Report of C. W. decayed and broken down. Pole fence



71. On the back of this picture appears the following: SE $\frac{1}{4}$ Sec. 10, S 7 W. Hd. of Ole Nelsen. Filed 3/4/90. Pat. 2/23/92. Sold 10/11/02 \$800. Taken Apr. 10, 1912. C. W. Kempton. Looking N. 2 acres natural clearing. Report of C. W. Kempton, Field Examiner, 2/6/12: Not occupied—no improvements except old log house, badly decayed and broken down. Pole fence around a fern opening of about 2 acres. Land very rough—no clearing—no cultivation. Timber will run about 30 thousand to the acre. (5 million to the claim. Entry made for timber only.)

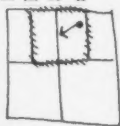


[Endorsed] No. 71. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-71. Received March 28, 1914. F. D. Monckton, Clerk.

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72. On the back of this picture appears the following: Enlarged view of $S\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 2, T. 8 S., R. 8 W. Homestead of John F. Johnson. Filed Feb. 15, 1900—Patented June 23, 1902. Commuted. Sold Dec. 6, 1905, for \$2000. Taken 4/9/12 by C. W. Kempton, Field Examiner O & C RR. Co. Looking N. W. Report of C. W. Kempton, examination made 2/29/12. "Not occupied—no improvements except old log house. Land on high ridge—general slope north. No cultivation or clearing. Timber on claim will run from 70000 to 80000 ft. per acre. (2,800,000 Bd. ft. to the 40 acres, or 10 to 11 millions to the claim). Timber clean and of nice size. Entry made for timber. (Stuart)



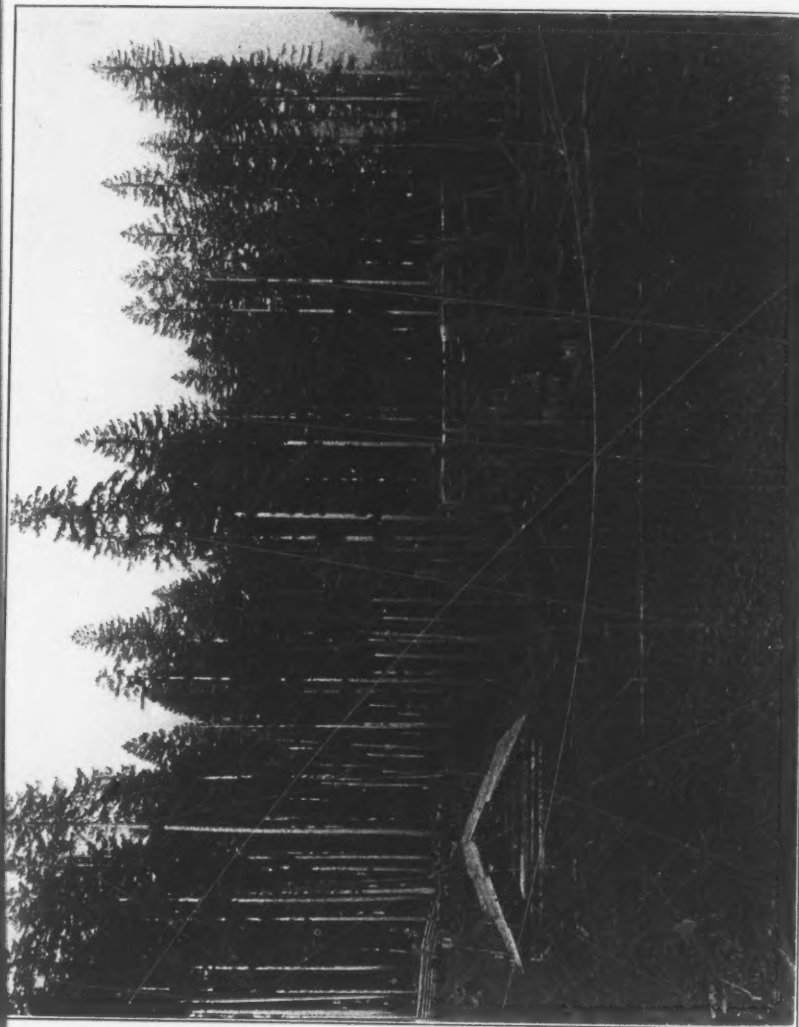
[Enforced] No. 72, Defis. Ex. 272, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defis. Ex. 273-72. Received March 28, 1914. F. D.

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73. No. 2949 — Wilson homestead. SE $\frac{1}{4}$ Sec. 8, from a point 5 chains west and 3 chains south of the quarter post between sections 8 and 9, looking west. Shows where house and outbuildings used to stand, with heavy timber in the background. (See letter A. W. Rees, June 28, 1912, File 464).

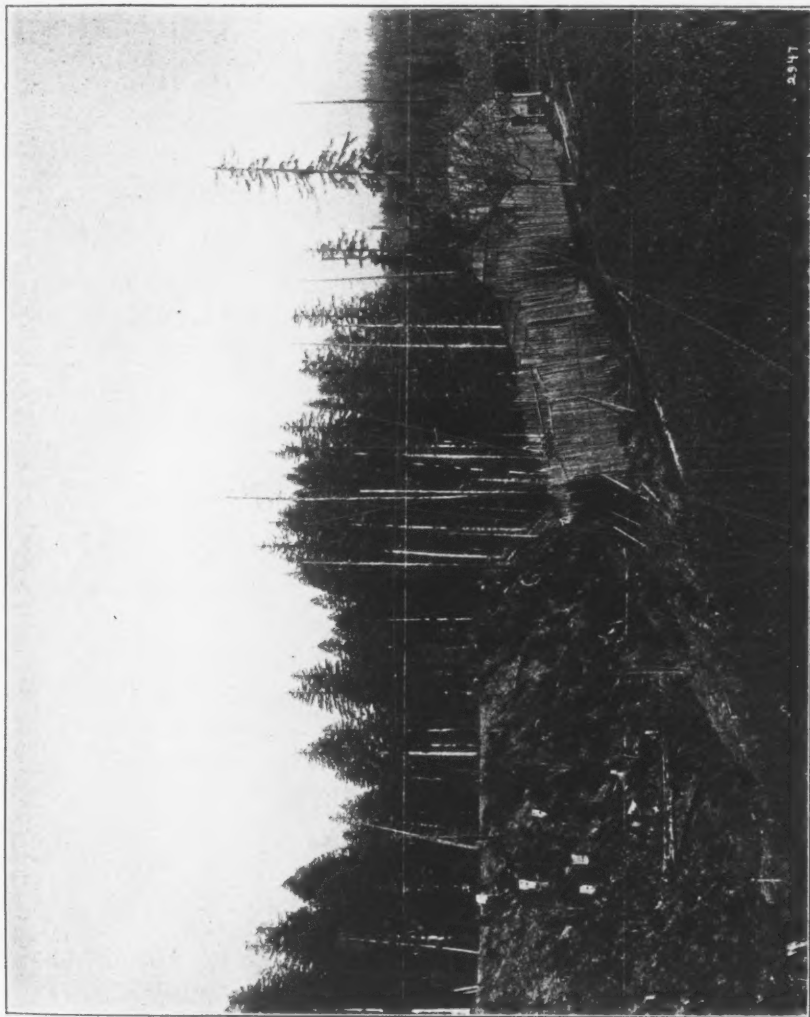
[Endorsed] No. 73. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-73. Received March 28, 1914. F. D. Monekton, Clerk.



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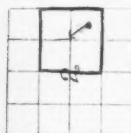
74. No. 2947—Anderson homestead; NE $\frac{1}{4}$ Sec. 8, T. 4 N., R. 3 W.; from a point 5 chains west and 2 chains north of the $\frac{1}{4}$ post between sections 8 and 9. View looking NW. Shows stable and something of the character of the land, but does not show the house, which stands just to the right of the stable. (See letter A. W. Rees, June 28, 1912. File 464). Anderson Claim NE $\frac{1}{4}$ Sec. 8, T. 4 N. R. 3 W.

[Endorsed] No. 74. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-74. Received March 28, 1914. F. D. Monckton, Clerk.





75. On the back of this picture appears the following: "A" S $\frac{1}{2}$ NE, N $\frac{1}{2}$ SE, 8 S., 8 W. Homestead of John F. Johnson. Filed Feb. 15, 1900—Patent. June 23, 1902. Sold 12/6/05 for \$2000. View taken Apr. 9, 1912, by C. W. Kempton, field examiner, O&C RR. Co. Looking NW. Report of C. W. Kempton, field examination 2/29/12. "Not occupied—no improvements except old log house—land on high ridge—slope north—no cultivation—no clearing. Timber on claim will run from 70 to 80 M. Bd. Ft. per acre, or 11 million feet to claim. Timber clear and of nice size—entry made for timber only."





76. On the back of this picture appears the following: S $\frac{1}{2}$ NE, N $\frac{1}{2}$ SE, Sec. 2, 8 S., 8. W. See picture "A" (No. 75) for details. Hd. of John F. Johnson.

[Endorsed] No. 76. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-76. Received March 28, 1914. F. D. Monckton, Clerk.



77. On the back of this picture appears the following: $S\frac{1}{2}$ NE, $N\frac{1}{2}$ SE, Sec. 2, 8 S., 8 W.



Homestead of John F. Johnson. See report on picture "A" (No. 75).

[Endorsed] No. 77. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-77. Received March 28, 1914. F. D. Monckton, Clerk.



78. On the back of this picture appears the following: S $\frac{1}{2}$ NE, N $\frac{1}{2}$ SE, Sec. 2, 8 S., 8 W. John F. Johnson. Filed 2/15/00. Pat. 6/23/02. Sold in 1905 for \$2000. Taken Apr. 9, 1912. C. W. Kempton.



Looking N. For report see picture "A" (No. 75).

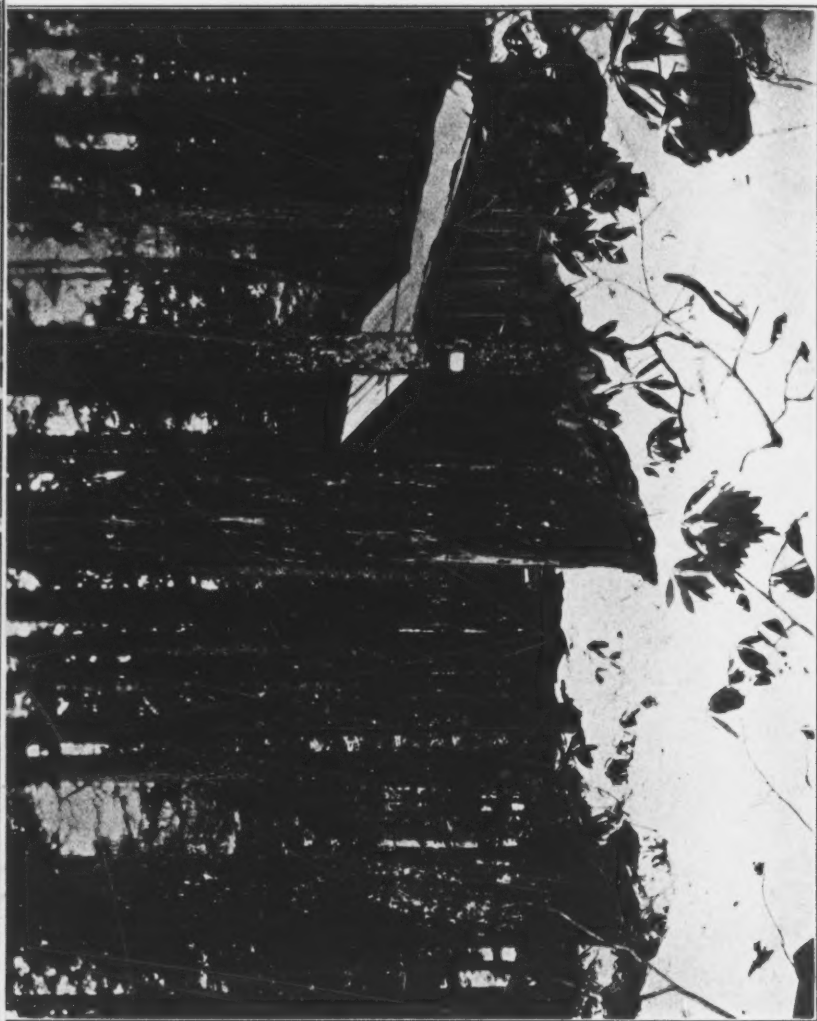
[Endorsed] No. 78. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-78. Received March 28, 1914. F. D. Monckton, Clerk.

this picture appears the following: "B", SE $\frac{1}{4}$ Sec. 1, 8 S., 8 W.



Railroad land. Claimed by S. R. Skeels (Lives in Falls City). Not occupied — partly furnished. View taken Apr. 9, 1912, by C. W. Kempton, field examiner O&C RR. Co. Taken looking NE. Showing house, barn and timber. The notice posted on tree states that he has filed an application to purchase this tract from the O&C RR. Co. @ \$2.50 per acre under the Revised Statutes U. S.

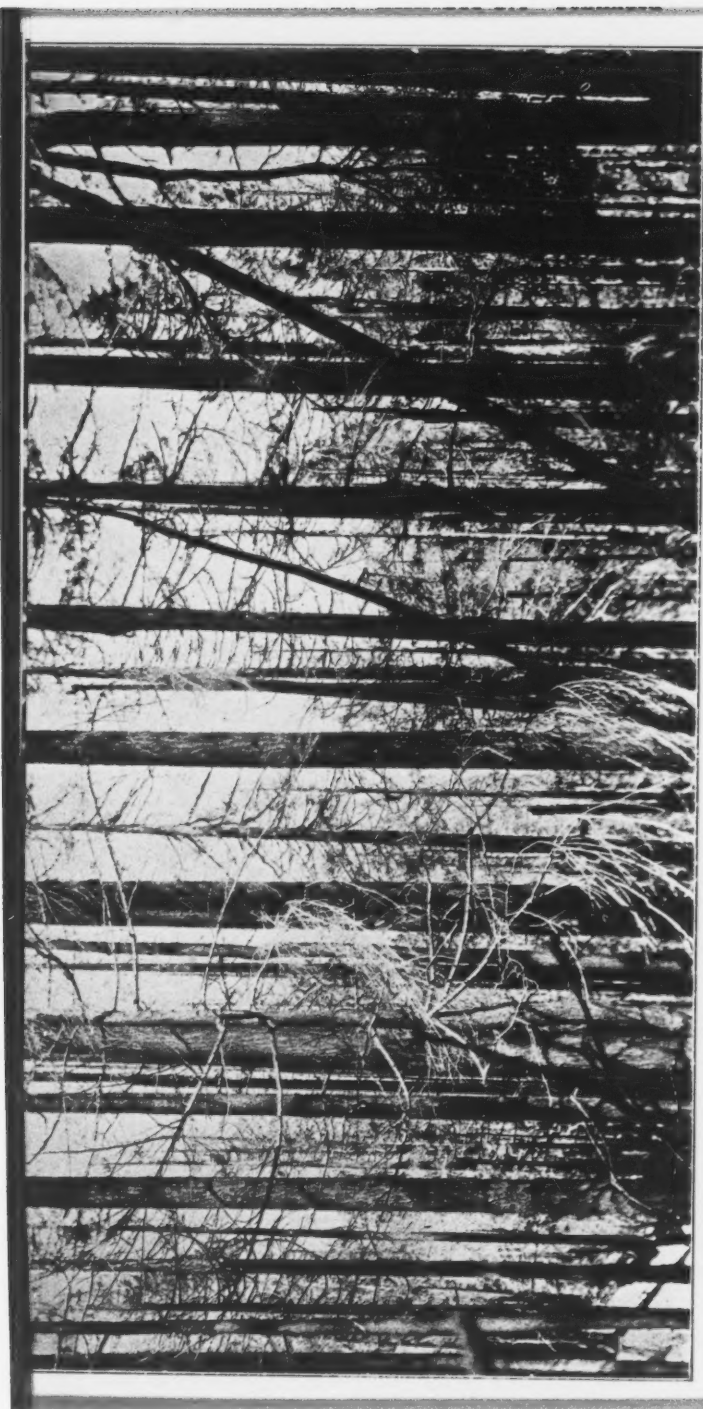
[Endorsed] No. 79. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-79. Received March 28, 1914. F. D. Monckton, Clerk.



80. On the back of this picture appears the following: View of SE $\frac{1}{4}$ Sec. 1, 8 S. 8 W. See explanation picture "B" (No. 79).

[Endorsed] No. 80. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-80. Received March 28, 1914. F. D. Monckton, Clerk.





81. On the back of this picture appears the following: "C" SE 1/4 Sec. 20, 7 S., 7 W. Homestead of Robt. B. Hansen. Filed July 3, 1900. Patent. Jan 23, 1902. View taken Mch. 29, 1912, by C. W. Kempton, Field Examiner O&C RR Co. Looking North. "Not occupied—improvements burnt down. No cultivation—no clearing—entry made for timber."

(Endorsed) No. 81. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-81. Received March 28, 1914. F. D. Monckton, Clerk.





82. On the back of this picture appears the following
View of SE $\frac{1}{4}$ Sec. 20, 7 S., 7 W. Robt. B. Hansen Hld.
See picture "C" (No. 81).

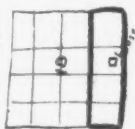
[Endorsed] No. 82. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of
Appeals, Ninth Circuit. Defts. Ex. 273-82. Received March 28, 1914. F. D.
Monckton, Clerk.

2-01-416 0548-074 02003
88

2-91-4628

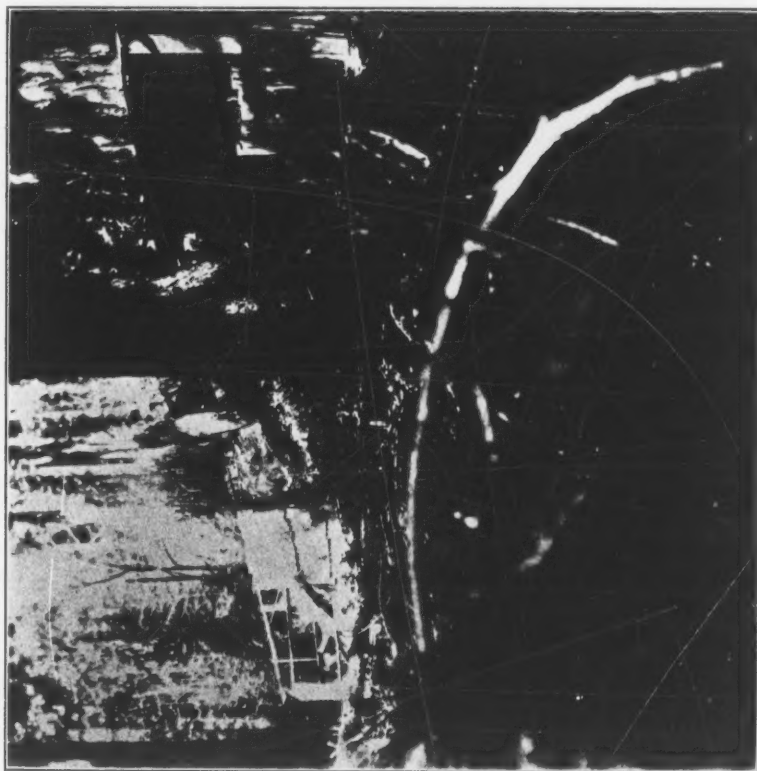
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84. On the back of this picture appears the following: S1½ SE¼, S1½ SW¼. Sec. 18, 7 S. 6 W.



Homestead of Alfred Haldeman. Filed 11/20/00. Patent 5/13/04. View taken Apr. 2, 1912, by C. W. Kempton, field examiner O&C RR. Co. Report of C. W. Kempton: Not occupied, no clearing, no cultivation. All good timber—most valuable for timber.

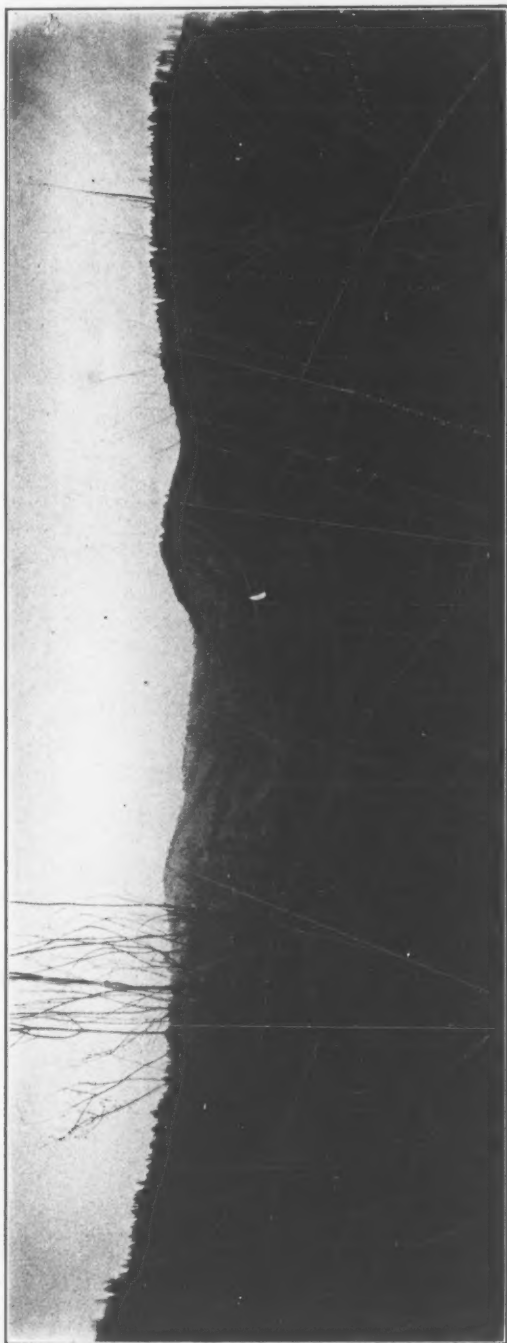
[Endorsed] No. 84. Defts. Ex. 273. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 273-84. Received March 28, 1914. F. D. Monckton, Clerk.





DEFENDANTS' EXHIBIT
274

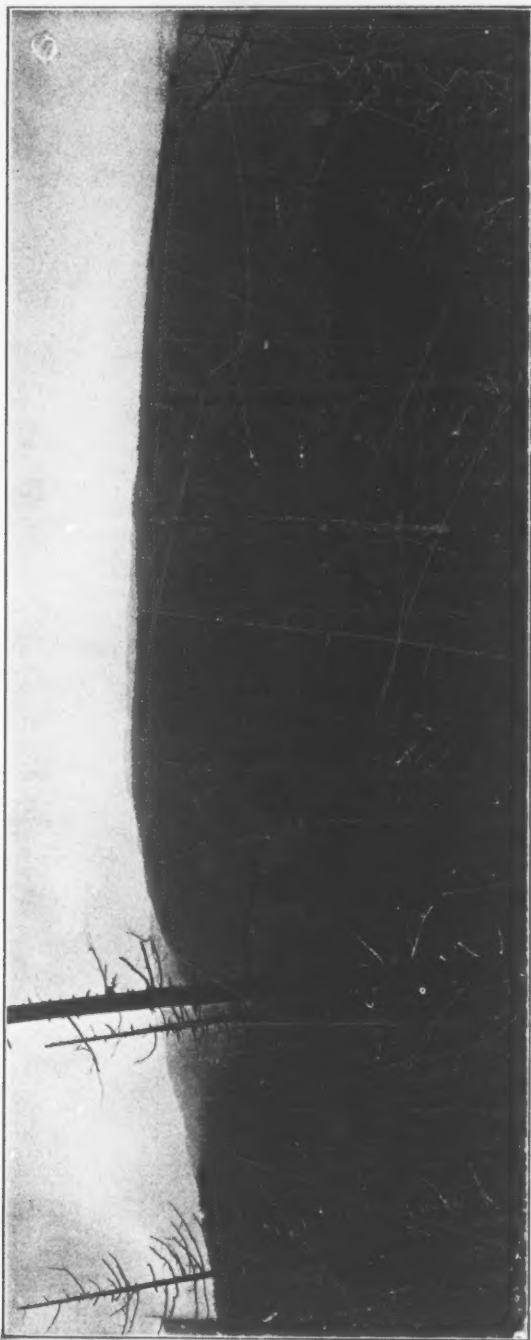
CONSISTS
OF SIX PHOTOGRAPHS
NUMBERED FOR CONVENIENCE
AS FOLLOWS:



1. On the back of this picture appears the following: Looking East from Northwest corner Sec 7 T 4 S R 5 E—
up North Fork of Clackamas River.

[Endorsed] No. 1. Defts. Ex. 274, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 274.1. Received March 28, 1914. F. D.
Monckton, Clerk.

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2. On the back of this picture appears the following: Photograph taken by Kempton 5/7/12 Looking West from Southeast corner Sec. 18 T 4 S R 5 E. W M

[Endorsed] No. 2. Defts. Ex. 274. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 274.2. Received March 28, 1914. F. D. Monekton, Clerk.



3. On the back of this picture appears the following: Taken from Snow Peak, SE of SE, Sec. 5, T. 11 S., R. 2 E. Looking Southwest.

[Endorsed] No. 3. Defts. Ex. 274. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 274-3. Received March 28, 1914. F. D. Monckton, Clerk.

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4. On the back of this picture appears the following: Taken from Snow Peak in SE of SE, Sec. 5, T. 11 S., R. 2 E. Looking East.

[Endorsed] No. 4. Defts, Ex. 274. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts, Ex. 274-4. Received March 28, 1914. F. D. Monckton, Clerk.



5. On the back of this picture appears the following: Taken from Snow Peak, SE. Sec. 5-11 S., R. 2 E.

[Endorsed] No. 5. Defts. Ex. 274, Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 274-5, Received March 28, 1914, F. D. Monckton, Clerk.

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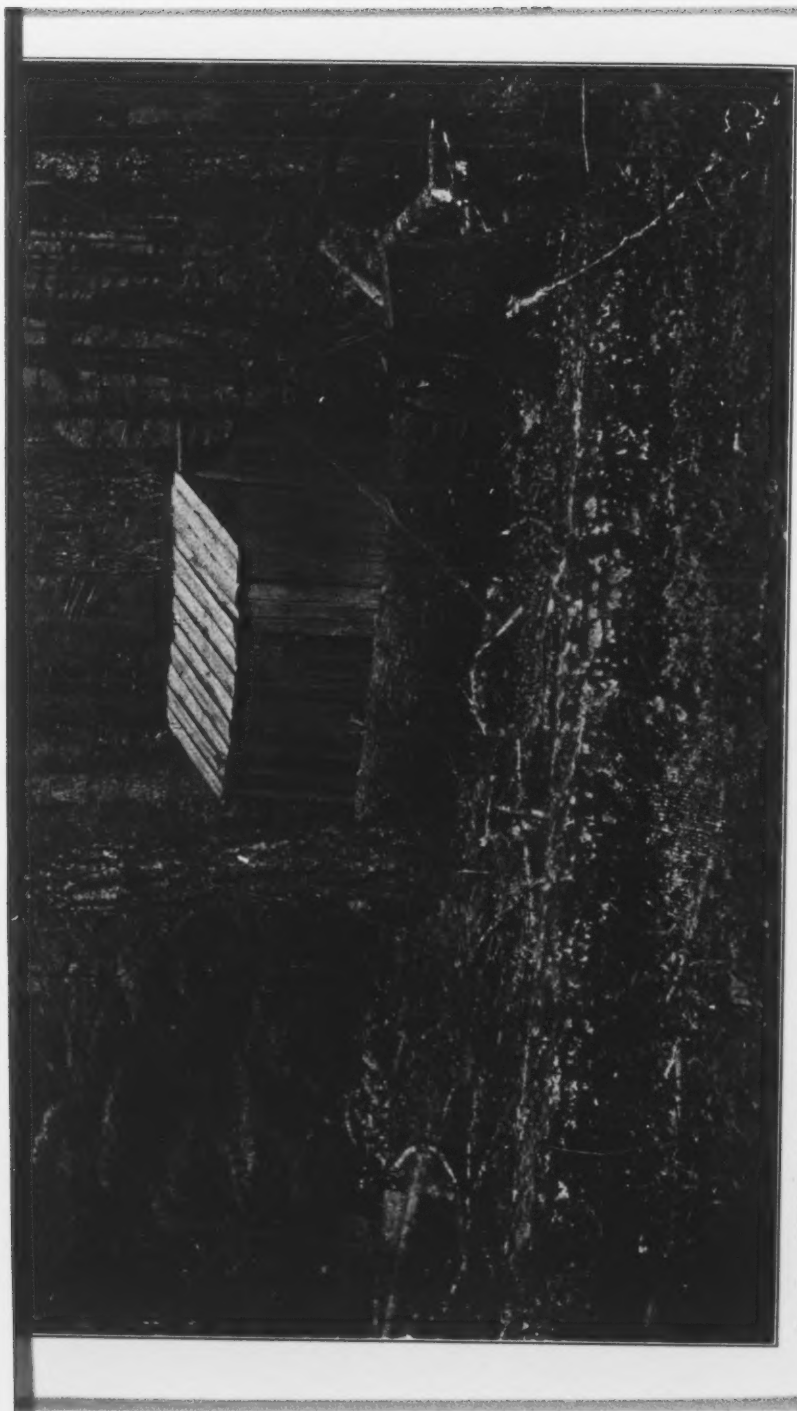
6. On the back of this picture appears the following: Looking Northwest from Southeast corner Sec. 18, T. 4 S., R. 5 E., W. M., Strait cabin can be seen in SE of NW $\frac{1}{4}$. Taken by Kempton 5/7/12.

[Endorsed] United States v. Oregon & California R. R. Co., Defendants' Ex. 274, Filed May 10, 1913, A. M. Cannon, Clerk U. S. District Court. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Defts. Ex. 274-6. Received March 28, 1914. F. D. Monckton, Clerk.



DEFENDANTS' EXHIBIT
313

CONSISTS
OF 4 PHOTOGRAPHS
TAKEN BY BEN IRWIN, IN DOUGLAS COUNTY, SHOWING
ABANDONED CABINS (NUMBERED FOR CONVENIENCE)
AS FOLLOWS:

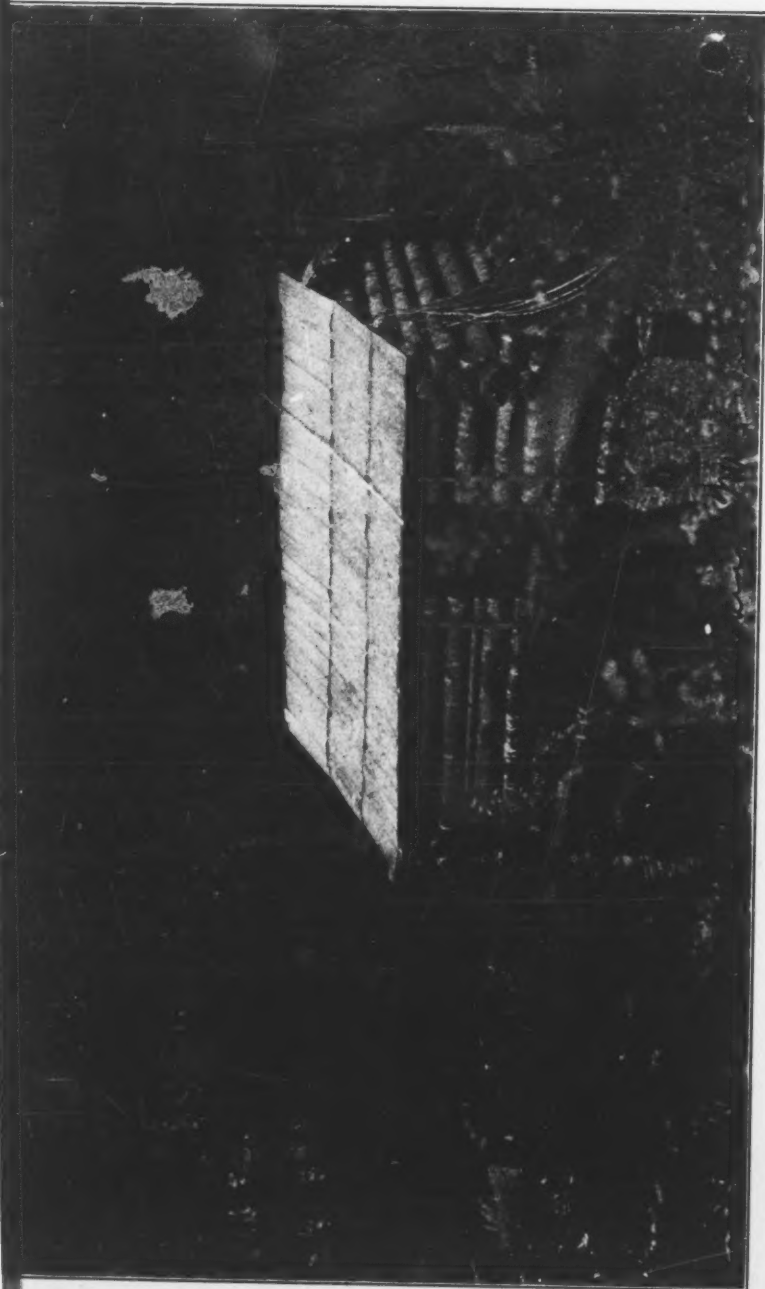


1. On SE 'SE-27-22S-6W-looking SW.



2. On SE'SE-27-22S-6W-looking E.

[Endorsed] No. 2. Defts. Ex. 313. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 313-2. Received March 28, 1914. F. D. Monckton, Clerk.



3. On NW-SE-27-22S-6W-looking NW.

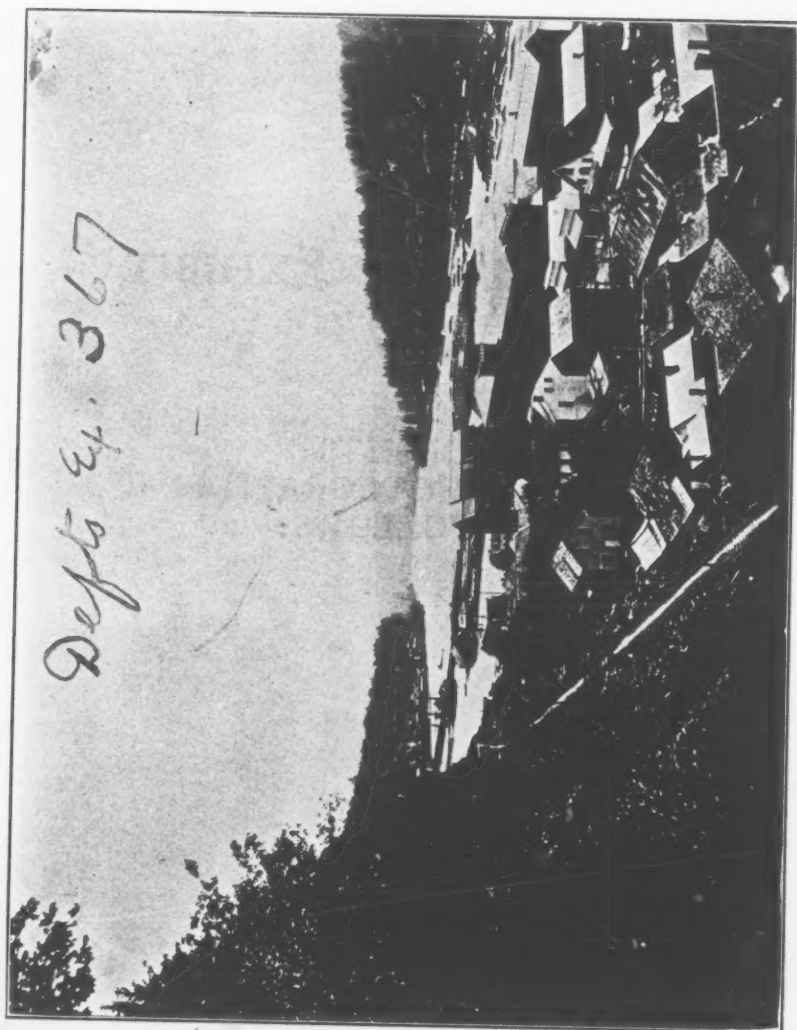
[Endorsed] No. 3. Defts. Ex. 313. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit. Defts. Ex. 313-3. Received March 28, 1914. F. D. Monckton, Clerk.





DEFENDANTS' EXHIBIT
367

**CONSISTS
OF A PHOTOGRAPH
AS FOLLOWS:**

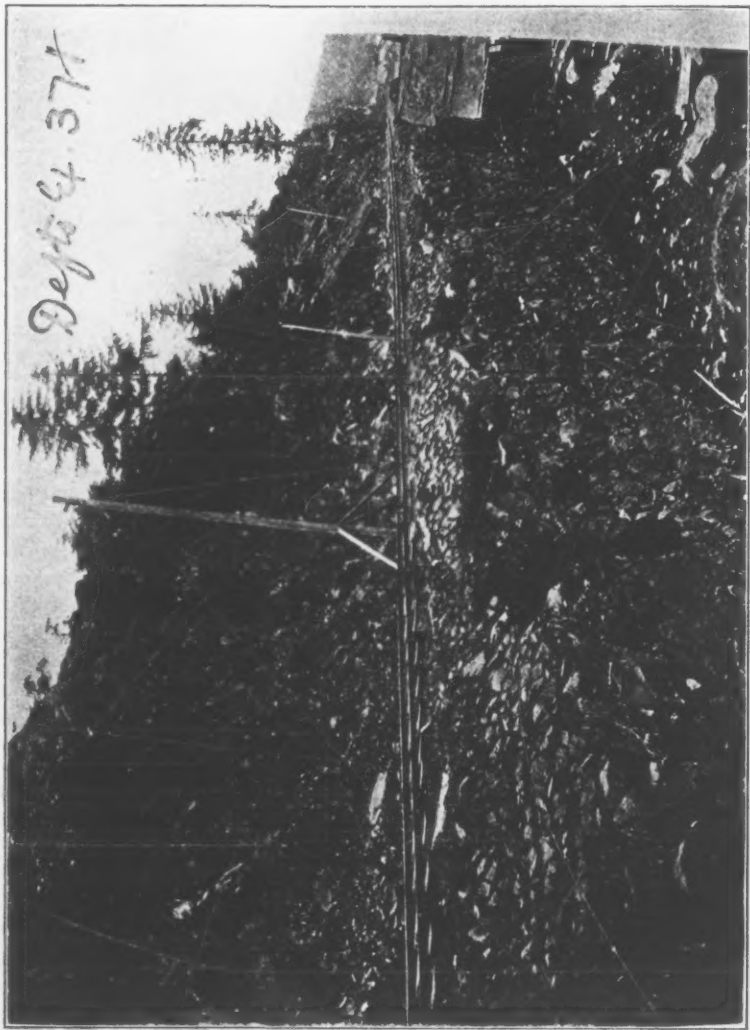


View of Oregon City-
Willamette Falls. Rail-
road graded under Elliott
in 1868.

[Endorsed] United States v.
Oregon & California R. R. Co.
et al. Defendants' Ex. 367. Case
No. 2400—U. S. Circuit Court of
Appeals, Ninth Circuit, Defts. Ex.
367. Received March 28, 1914.
F. D. Monckton, Clerk.

DEFENDANTS' EXHIBIT
371

CONSISTS
OF A PHOTOGRAPH
AS FOLLOWS:



Def'ts 4. 371

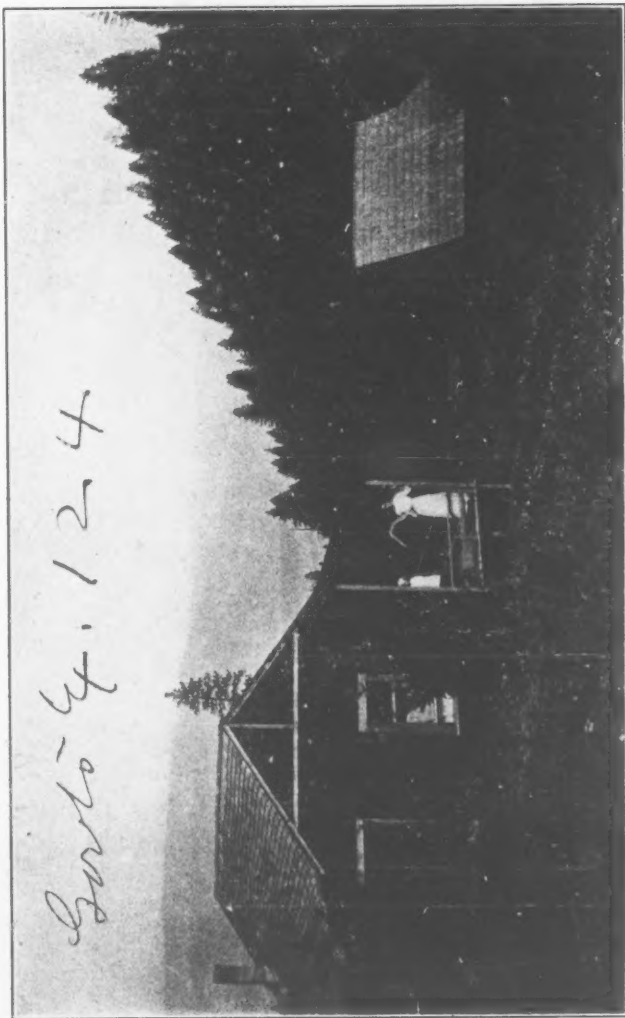
Retaining walls of dry rubble masonry at Oregon City. Put in by Elliott in 1868.

[Endorsed] United States v. Oregon & California R. R. Co. et al. Defendants' Ex. 371. Case No. 2400—U. S. Circuit Court of Appeals, Ninth Circuit, Def'ts. Ex. 371. Received March 28, 1914. F. D. Morekton, Clerk.

GOVERNMENT'S EXHIBIT
124

CONSISTS
OF A PHOTOGRAPH
AS FOLLOWS:

Garbo-4. 12. 4



E. J. Mahan's place,
being the west half of
the northwest quarter and
the northwest quarter of
the southwest quarter of
section 17, township 39,
range 1 east.

[Endorsed] United States v.
Oregon & California R. R. Co.
et al. Government's Ex. 124. Case
No. 2400—U. S. Circuit Court of
Appeals, Ninth Circuit. Govts. Ex.
124. Received March 28, 1914.
F. D. Monckton, Clerk.

IN THE UNITED STATES CIRCUIT
COURT OF APPEALS
NINTH CIRCUIT

OREGON & CALIFORNIA RAILROAD
COMPANY, a corporation, et al.,
Defendants and Appellants.

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants.

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants.

No. 2400

vs.

THE UNITED STATES OF AMERICA,
Appellee.

ORDER AUTHORIZING PRINTING BY CLERK
OF PHOTOGRAPHIC EXHIBITS.

Based upon stipulation of parties, set out in paragraph VIII, pages 8659-8660, Volume XVI, Transcript of Record, and pursuant to due notice to attorneys for the United States, and on application of Wm. F. Herrin, P. F. Dunne and Wm. D. Fenton, Solicitors for the Defendants and Appellants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee:

IT IS HEREBY ORDERED that photographic exhibits known as "Defendants' Exhibits 267 to 270, both inclusive, 273, 274, 313, 367, 371", and "Government's Exhibit 124", now certified up from

the Court below and filed in this Court as a part of the transcript of record in said cause, may be printed by and under the direction of Frank D. Monckton, Clerk of this Court; and that 210 copies thereof may be so printed, and that when so printed there shall be filed in this Court 51 copies thereof as a part of the transcript of record for the use of this Court and of the Supreme Court of the United States, in case of an appeal to that Court from the decision to be rendered in this Court, and the remainder of said volume shall be delivered to the solicitors of record of the appellants Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage.

IT IS FURTHER ORDERED that said exhibits may be withdrawn by the appellants from the files for said purpose, and delivered to the solicitors for the aforesaid appellants, they to assume all risk of loss and mutilation and damages resulting from delays.

Dated: April 7th 1914.

WM. W. MORROW,
Circuit Judge.

Filed Apr. 7th 1914

F. D. Monckton,
Clerk.

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United States
Circuit Court of Appeals

For the Ninth Circuit.

**OREGON AND CALIFORNIA RAILROAD COM-
PANY, a Corporation, et al.,**

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United
States for the District of Oregon, from the
Decree Entered December 9, 1915.**

**Certificate of the United States Circuit Court of Appeals
for the Ninth Circuit, Certifying Certain Questions
or Propositions of Law to the Supreme Court
of the United States, Under Section 239
of the Judicial Code (36 Stat. 1157).**

MAY 2 61916



United States
Circuit Court of Appeals

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**OREGON AND CALIFORNIA RAILROAD COM-
PANY, a Corporation, et al.,**

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United
States for the District of Oregon, from the
Decree Entered December 9, 1915.**

**Names and Addresses of Solicitors upon This
Appeal.**

**For Appellants, Oregon and California Railroad
Company, et al.:**

WM. F. HERRIN, San Francisco, Cal.

P. F. DUNNE, San Francisco, Cal.

WM. D. FENTON, Portland, Oregon.

For Appellant, Union Trust Company:

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Portland, Oregon.**

**MILLER, KING, LANE & TRAFFORD and
JOHN C. SPOONER, New York.**

For Appellee:

**THOMAS W. GREGORY, Attorney-General,
JOHN W. DAVIS, Solicitor-General.**

**CONSTANTINE J. SMYTH, Special Assist-
ant to Attorney-General.**

**CLARENCE L. REAMES, United States Dis-
trict Attorney for Oregon.**

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States, Under Section 239 of the Judicial Code (36 Stat., 1157).

In this case, this Court heretofore, under Section 239 of the Judicial Code, certified to the Supreme Court of the United States certain questions or propositions of law concerning which it desired the instruction of that court for its proper decision; and thereupon the Supreme Court required that the whole record and cause be sent up to it for its consideration, and the same having been done, the Supreme Court decided the whole matter in controversy as appears from the decision of the court reported in 238 U. S. at pages 393-439.

On December 8th, 1915, the mandate of the Supreme Court was filed in the District Court, as follows:

"MANDATE OF UNITED STATES SUPREME COURT.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the District of Oregon, Greeting:

(Seal, United States Supreme Court)

WHEREAS, lately in the District Court of the United States, for the District of Oregon, before you, or some of you, in a cause between The United States of America, complainant, and Oregon & Cali-

fornia Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, John L. Snyder et al., defendants; John L. Snyder, Julius F. Prah, Albert E. Thompson et al., complainants, and Oregon & California Railroad Company, Union Trust Company, and S. T. Gage, defendants, in cross-complaint, and William F. Slaughter et al., interveners, in Equity, No. 3340, wherein the decree of the said District Court entered in said cause on the 1st day of July, A. D. 1913, is in the following words, viz.:

(Here follows copy of said decree of said District Court, as the same is contained in Volume III, pages 1296-1550 of printed transcript of the record on the former appeals taken in this case from said decree of July 1, 1913, and which said transcript of the record is on file in the clerk's office of the Circuit Court of Appeals for the Ninth Circuit, the case being numbered therein 2400, and in the clerk's office of the Supreme Court of the United States, the case in the latter court being numbered 679, October Term, 1914.)

as by the inspection of the transcript of record of the United States Circuit Court of Appeals for the Ninth Circuit, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hun-

dred and fourteen, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court that the decree of the District Court of the United States for the District of Oregon in this cause be, and the same is hereby, reversed.

AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

June 21, 1915.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 7th day of August in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States."

Thereupon, and on December 8th, 1915, the following proceedings were had, and the same were embodied in a statement of the case, approved by the Judge of the District Court—such statement and the order approving the same, being as follows:

"STATEMENT OF THE CASE.

Be it remembered that on the 8th day of December, 1915, the above cause, No. 3340, in Equity, came on for hearing before the above-named court upon the form of the decree to be entered therein under and in pursuance of the mandate theretofore issued from the Supreme Court of the United States on the opinion and decree of said Supreme Court reversing the decree made and entered by the above-entitled court, in said cause, on the first day of July, 1913, and remanding the cause for further proceedings in accordance with said opinion. Mr. Constantine J. Smyth, special assistant to the Attorney-General, and Mr. Clarence L. Reames, United States District Attorney for the District of Oregon, represented the complainant. Mr. Peter F. Dunne and Mr. Wm. D. Fenton represented the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and Mr. John M. Gearin, represented the defendant, Union Trust Company of New York, individually and as trustee, and the cross-complainants and interveners in said cause were represented by their respective counsel, Mr. A. W. Lafferty and Mr. L. C. Garrigus.

On motion of counsel for the complainant, the Court ordered that said mandate of the Supreme Court be filed and the same was thereupon filed with the clerk of this court.

The complainant, through its counsel, then submitted to the Court the following form of decree as

being in conformity with said opinion and mandate of the Supreme Court of the United States, viz.:

*'In the District Court of the United States, for the
District of Oregon.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

OREGON AND CALIFORNIA RAILROAD
COMPANY et al.,

Defendants,

JOHN L. SNYDER et al.,

Defendants and Cross-Complainants,

WILLIAM F. SLAUGHTER et al.,

Intervenors.

DECREE.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the — day of ——— in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-

complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; and from removing or authorizing the re-

moval of mineral or other deposits therein; from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the Court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the Court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to

the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That the complainant shall have the right to apply to the Court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting acts, and the Court retains jurisdiction over the action for the purpose of granting such application if good cause therefor appears.

7. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912.

8. That the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, Union Trust Company, the cross-complainants and interveners, and each of them, its lawful costs and disbursements herein, taxed at \$——, and that execution issue therefor.

Done in open court this —— day of December, 1915.

BY THE COURT,

_____,
Judge.'

And the counsel for the complainants asked the Court to adopt the aforesaid form of decree submitted by them as the form of decree to be entered upon said mandate.

The defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the defendant, Union Trust Company of New York, individually and as trustee, then submitted to the Court the following form of decree as being in conformity with said opinion and mandate of the Supreme Court of the United States, viz.:

‘[Title of Court and Cause as contained in foregoing Form of Decree submitted by the Complainant.]

In pursuance of the mandate of the Supreme Court of the United States, filed in this court on the — day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the “defendants,” be, and the same is hereby set aside, and held for naught, but adhered to in all respects as to the defendant, and cross-complainants, hereinafter called the “cross-complainants,” and the “interveners.”

2. That the said defendants and their respective officers and agents be and each is hereby enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25,

1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants, all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act.

Done in open court this — day of —, 1915,

BY THE COURT,

_____,
Judge.'

And the counsel for said defendants asked the Court to sign and to order the entry of a decree in the form submitted by them as being the proper form of decree to be entered upon said mandate.

After arguments had by the respective counsel, the Court took under advisement the matter of the form of the decree to be entered upon said mandate; and on the 9th day of December, 1915, the Honorable Charles E. Wolverton, Judge of this Court, presiding on the aforesaid hearing, signed the following form of decree, viz.:

‘[Title of Court and Cause as contained in foregoing
Form of Decree submitted by the Complainant.]

In pursuance of the mandate of the Supreme Court of the United States, filed in this court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called “the defendants,” be, and the same is hereby set aside, and held for naught, but adhered to in all respects as to the defendant, and cross-complainants, hereinafter called the “cross-complainants,” and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined

from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre: and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from

said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the Court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the Government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 30, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6,249.02, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT,

(Signed) CHARLES E. WOLVERTON,

Judge.'

And said decree was thereupon on said 9th day of December, 1915, entered as the judgment and decree of this Court.

The defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, duly excepted to the entry of said form of decree last mentioned, and also to the failure of said Judge to sign a decree in the aforesaid form submitted by them.

Said defendants now present to the Court this their Statement of the Case, and ask the Court to approve of the same and to direct that it be filed in the clerk's

office of this court and that it become a part of the record for the purposes of the appeal, taken by said defendants on January 8th, 1916, from said judgment and decree of this Court entered December 9, 1915, as aforesaid. This statement is not intended to be and is not a statement of the case or agreed statement under federal equity rule seventy-seven but is submitted as a statement analogous to the statement of the evidence provided for in federal equity rule seventy-five.

WM. F. HERRIN,
P. F. DUNNE and
WM. D. FENTON,

Attorneys for Appellants, Oregon and California
Railroad Company, Southern Pacific Company,
and Stephen T. Gage, individually and as trustee.

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
Attorneys for Appellant, Union Trust Company of
New York, individually and as trustee.

District of Oregon,
County of Multnomah,—ss.

Due service of the within statement of the case is
admitted this 1st day of February, 1916.

CLARENCE L. REAMES,
Of Solicitors for Complainant.

Filed February 1, 1916. G. H. Marsh, Clerk."

And afterwards, to wit, on Tuesday, the 1st day of
February, 1916, the same being the 80th judicial day
of the regular November, 1915, term of said Court;

present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER APPROVING STATEMENT OF THE
CASE.

This cause came on to be heard this day upon the application of the appellants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, defendants, for an order approving the statement of the case prepared and presented by the appellants, and now tendered to be filed herein, the appellants appearing by their attorneys Wm. D. Fenton and John M. Gearin, and the complainant appearing by Clarence L. Reames, United States District Attorney for the District of Oregon, representing himself and Thomas W. Gregory, Attorney-General of the United States, and C. J. Smyth, special assistant to the Attorney-General of the United States, attorneys for said complainant; and it appearing to the Court that said statement is correct and that there is no objection to the approval thereof by this Court,

It is ordered that said Statement of the Case now tendered to be filed is hereby approved and the same is now directed to be filed in the clerk's office of this court as of this date and to become a part of the record, for the purposes of the appeal heretofore taken by said defendants from the judgment and decree of this Court entered December 9, 1915.

Dated: February 1st, 1916.

CHAS. E. WOLVERTON,

Judge of said District Court.

District of Oregon,

County of Multnomah,—ss.

Due service of the within order approving statement of the case is admitted this 1st day of February, 1916.

CLARENCE L. REAMES,
Of Solicitors for Complainant.

Filed February 1, 1916. G. H. Marsh, Clerk.

From the decree of the District Court, of December 9th, 1915, set out in the above statement the appellants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company of New York, individually and as trustee, duly took and perfected their appeals to this court and accompanied the same with their assignments of error, duly filed on January 8th, 1916, as follows:

DEFENDANT OREGON AND CALIFORNIA
RAILROAD COMPANY'S ASSIGNMENT
OF ERRORS.

The defendant, Oregon and California Railroad Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the

United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or

authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of

the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities

of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualifications as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not direc-

tive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualifications arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering

a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both

below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’ be, and

the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein or-

dered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Oregon and California Railroad Company, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the 'defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Southern Pacific Company, said Stephen T. Gage, individually and as Trustee, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Oregon and California Railroad Company.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor General of the United States.

C. J. SMYTH,
Special Assistant to the Attorney General.
Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said court and cause, an Assignment of Errors, by the defendant, the Southern Pacific Company, in words and figures as follows, to wit:

DEFENDANT SOUTHERN PACIFIC COMPANY'S ASSIGNMENT OF ERRORS.

The defendant, Southern Pacific Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.
2. The Court erred in not pursuing the mandate of the Supreme Court of the United States thereto-

fore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removing of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase

"on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing

such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said land—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settler's clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such dis-

cretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provision of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any

qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company,

individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each

to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants’ and ‘interveners.’

2. That said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place

or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Southern Pacific Company, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

“That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called ‘the defendants,’ be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross complainants, hereinafter called the ‘cross-complainants,’ and the interveners,”

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon and California Railroad Company, said Stephen T. Gage, individually and as trustee, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Southern Pacific Company.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,

Solicitor General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney General,

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said court and cause, an Assignment of Errors by Stephen T. Gage (individually and as trustee), in words and figures as follows, to wit:

DEFENDANT STEPHEN T. GAGE'S (Individually and as Trustee) ASSIGNMENT OF ERRORS.

The defendant, Stephen T. Gage, individually and as trustee, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing,

as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands, or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber

thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not

competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. That the Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decree-

ing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said land—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and

remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon, or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called settler's proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and like-

wise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and

stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the following decree:

“In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the ‘defendants’ be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants’ and ‘interveners.’

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one pur-

chaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Stephen T. Gage, individually and as trustee, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled Court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause, so far as it affects the defendants, Oregon & California Railroad Company, Southern

Pacific Company, Stephen T. Gage, individually and as Trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants,' and the interveners,"

and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon and California Railroad Company, said Southern Pacific Company, and said Union Trust Company, individually and as Trustee, as may be proper.

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors and Attorneys for said Stephen T. Gage, individually and as Trustee.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,

Solicitor General of the United States.

C. J. SMYTH,

Special Assistant to the Attorney General,

Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,

United States Attorney.

Filed Jan. 8, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 8th day of January, 1916, there was duly filed in said Court, and cause, an Assignment of Errors by the Union Trust Com-

pany (individually and as trustee), in words and figures as follows, to wit:

**DEFENDANT UNION TRUST COMPANY'S
(Individually and as Trustee) ASSIGNMENT
OF ERRORS.**

The defendant, Union Trust Company, individually and as trustee, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above cause, No. 3340 in Equity, and in the decision, judgment and decree rendered, made and entered therein on the 9th day of December, 1915, under and in alleged pursuance of the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915, and assigns the following as the errors complained of:

1. The Court erred in making and entering the said decree of December 9th, 1915.

2. The Court erred in not pursuing the mandate of the Supreme Court of the United States theretofore filed in said cause on December 8th, 1915.

3. The said decree of December 9th, 1915, is not in pursuance of the said mandate, and the Court accordingly erred in making and entering such decree.

4. The Court erred in making and entering the said decree of December 9th, 1915, and each and every paragraph thereof.

5. The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the

lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

6. The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

7. The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal, of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or any other deposits in said lands, except as a

part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land containing the mineral or other deposits.

8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber of said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal, of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removal or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

9. The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

10. The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

11. The Court erred in not holding and decreeing that the terms of the Settlers' Proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refraining from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

12. The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

13. The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

14. The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called Settlers Proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated,

had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

16. The Court erred in not holding and decreeing that the language of the so-called Settlers Clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands were unqualified.

17. The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of

the soil thereof—subject to any qualification arising out of the limited injunction referable to the six months' period above mentioned.

18. The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights therein of a grantee in fee simple, including the rights of such grantee to the timber thereon, or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

19. The Court erred in not holding and decreeing that the provisions of the so-called Settlers Proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

20. The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction,

referable to the aforesaid period of six months.

21. The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called Settlers Proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

22. The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein, and in adjudging and decreeing that execution issue against the said defendants or any or either of them, for any costs or disbursements herein.

25. The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad

Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

26. The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called Settlers Clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them or either of them with costs and disbursements herein in favor of the complainant.

27. The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

28. The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by said last-named defendants and each and every of them:—that is to say, in not making and entering as its de-

cree in said cause the following decree:

"In pursuance of the mandate of the Supreme Court of the United States, filed in this court on the 8th day of December, 1915, in the above-entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause, so far as it affect the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the 'defendants,' be and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants' and 'interveners.'

2. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands or any part

thereof, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

WHEREFORE, this defendant, Union Trust Company, individually and as trustee, prays that the aforesaid judgment and decree which was made, rendered and entered herein by the above-entitled court in said cause No. 3340 in Equity, on the 9th day of December, 1915, and that each of said paragraphs of said judgment and decree be reversed, excepting paragraph 1 thereof, wherein it is provided:

"That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called 'the defendants,' be, and the same is hereby, set aside and held for naught, but is adhered to in all respects as to the defendants and crosscom-

plainants, hereinafter called the 'cross-complainants' and the interveners," and particularly that paragraph 2 and that paragraph 7 of said judgment and decree be reversed, and for such other relief to this defendant, said Oregon & California Railroad Company, said Southern Pacific Company, and said Stephen T. Gage, individually and as trustee, as may be proper.

MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
JOHN C. SPOONER, JOHN M. GEARIN,
Solicitors for said Union Trust Company, Individually and as Trustee.

Service of the foregoing Assignments of Errors admitted this 8th day of January, 1916.

JOHN W. DAVIS,
Solicitor-General of the United States.

C. J. SMYTH,
Special Assistant to the Attorney-General,
Solicitors and Attorneys for Appellee.

CLARENCE L. REAMES,
United States Attorney.

Filed January 8, 1916. G. H. Marsh, Clerk.

The following stipulation, relative to the record on appeal was made and the following order entered:

**STIPULATION RELATIVE TO RECORD ON
APPEAL.**

IT IS HEREBY STIPULATED by and between the complainant, United States of America, and the defendants above named, and each of them, as follows:

1. That on the appeal taken by the above-named

defendants on the 8th day of January, 1916, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree made and entered in the United States District Court for the District of Oregon in said cause No. 3340 in Equity, on December 9, 1915, said United States Circuit Court of Appeals may, in so far as the same may be relevant or material, consider the printed transcript of the record filed in said Circuit Court of Appeals on the former appeals taken in said cause No. 3340 from the decree of said United States District Court, entered July 1, 1913, and may consider any part or portions of said transcript, including the pleadings in the cause, the statement of the evidence and the exhibits or any of them contained in said printed transcript of record.

2. That in the even that said United States Circuit Court of Appeals should certify to the Supreme Court of the United States any questions or question or propositions or proposition of law upon which it desires the instruction of that court for its proper decision in passing upon the aforesaid appeal or that said Supreme Court should require that the whole record and cause be sent up to it for its consideration, or in the event that an appeal should be prosecuted to said Supreme Court from any judgment rendered on the aforesaid appeal of said cause taken on said 8th day of January, 1916, to said United States Circuit Court of Appeals or that said appeal taken on January 8, 1916, should in any other manner be hereafter

brought on for hearing in said Supreme Court, said Supreme Court of the United States may, in so far as the same may be relevant or material, consider the printed transcript of the record on the aforesaid former appeals in said cause, which is now on file in said Supreme Court, including the pleadings, the statement of the evidence and the exhibits or any of them contained in said printed transcript of record.

3. Such printed transcript of the record on said former appeals, as now on file in said Circuit Court of Appeals and also on file in said Supreme Court, shall be deemed a part of the record on the aforesaid appeal taken on January 8, 1916, to said Circuit Court of Appeals, and on any appeal which may be taken to said Supreme Court from the judgment of said Circuit Court of Appeals rendered on said last-mentioned appeal or in any other hearing growing out of said appeal which may be had before said Supreme Court as in last above paragraph hereof mentioned; and, as such, it may, in so far as the same may be deemed relevant or material, be referred to by counsel of any of the parties hereto, either in said Circuit Court of Appeals or in said Supreme Court.

4. There shall not be included or printed in the transcript of record on the aforesaid appeal taken by defendants on January 8, 1916, to said United States Circuit Court of Appeals, any of the pleadings, papers or documents filed, or proceedings had, in said United States District Court in said cause prior to December 8, 1915, and the clerk of the court, in making, and directing the printing of, said tran-

script of record, shall omit therefrom any of said pleadings, papers, documents or proceedings filed or had in said court and cause prior to December 8, 1915—provided, however, that it may be stated or shown in said transcript on what date the mandate issued by said Supreme Court upon its opinion rendered June 21, 1915, on the former appeals in the cause (No. 679—October term, 1914) was received by the clerk of said United States District Court. Said clerk shall include, among the other papers, documents, files and proceedings to be incorporated in said transcript, a copy of said opinion of the Supreme Court and also a copy of the aforesaid mandate of said Supreme Court filed in said cause in said District Court on December 8, 1915, omitting, however, from the latter, any copy of the copy of the former decree of said United States District Court made and entered July 1, 1913, which is embodied in and forms a part of said mandate. A copy of said former decree shall not be printed in said transcript of record as a part of said mandate, but in the copy of the mandate as printed in said transcript, said former decree may be referred to by reference to the volume and pages of the record on the former appeals taken in said cause wherein a copy of said former decree is set out.

5. If any statement of the record or statement on appeal which may be prepared by the appellants or any of them they may wish to insert a copy of said mandate in and as a part of said statement, they need not incorporate in said statement of the record

or statement on appeal or in any statement of the record or statement on appeal which may be filed by any of them in said cause, a copy of said former decree in said District Court entered July 1, 1913, but they may in said copy of the mandate simply refer to said former decree by reference to the volume and pages of the record on said former appeals wherein a copy of said former decree is set out.

6. It is further stipulated that an order of this court may be made upon this stipulation containing the provisions and substantially in the language as above set forth in paragraphs 4 and 5 hereof.

7. It is further understood and agreed that the complainant denies the right of the defendants to appeal to the Circuit Court of Appeals from the decree entered by said United States District Court on December 9, 1915, denies the jurisdiction of said Circuit Court of Appeals to hear and determine said appeal and reserves its right to object to the defendants prosecuting said appeal and to the jurisdiction of the Circuit Court of Appeals in the matter and this stipulation shall not in any wise prejudice said rights or any of them, or the right of the complainant to insist upon them, but in the event that said Circuit Court of Appeals takes jurisdiction the complainant does not waive but reserves any right it may have to confine the inquiry of the court on the appeal to a consideration of said mandate of the Supreme Court of the United States and the decree of said District Court entered December 9, 1915.

8. It is further stipulated and agreed in this regard that the sole purpose of this stipulation is to

save expense in the printing of the record and to avoid any duplication of the record on the present appeal.

Dated February 1st, 1916.

CLARENCE L. REAMES,
United States Attorney for Oregon for and by direction of the Attorney-General of the United States, of Solicitors and Attorneys for Complainant.

WM. F. HERRIN,
P. F. DUNNE and
WM. D. FENTON,

Solicitors for Oregon and California R. R. Co.,
Southern Pacific Co. and Stephen T. Gage, individually and as trustee,
MILLER, KING, LANE & TRAFFORD,
DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Union Trust Company Individually and as Trustee.

Filed February 1, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 1st day of February, 1916 the same being the 80th judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER REGARDING PRINTING OF
RECORD.

This cause came on for hearing this day upon stipulation of the respective parties, dated January —, 1916, as to the printing of the record on the ap-

peal of the defendants, taken to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of this court entered December 9, 1915, and as to the use in said Circuit Court of Appeals and in the Supreme Court of the United States, as a part of the record on appeal, of the printed transcript of record of the former appeals taken in above cause No. 3340 from the decree of said District Court for the District of Oregon entered July 1, 1913, and it appearing to the Court that the parties have made and filed a written stipulation wherein it is provided, among other things, that an order substantially to the following effect may be made by this Court:

It is now therefore ordered that:

1. There shall not be included or printed in the transcript of record on the aforesaid appeal taken by defendants on January 8, 1916, to said United States Circuit Court of Appeals any of the pleadings, papers or documents filed, or proceedings had, in said United States District Court in said cause prior to December 8, 1915, and the clerk of the court, in making, and directing the printing of, said transcript of record, shall omit therefrom any of said pleadings, papers, documents or proceedings filed or had in said court and cause prior to December 8, 1915—provided, however, that it may be stated or shown in said transcript on what date the mandate issued by said Supreme Court upon its opinion rendered June 21, 1915, on the former appeal of the cause (No. 679—October term, 1914) was received by the clerk of said United States District Court. Said clerk shall include, among the other papers, documents, files and

proceedings to be incorporated in said transcript, a copy of said opinion of the Supreme Court and also a copy of the aforesaid mandate of said Supreme Court filed in said cause in said District Court on December 8, 1915, omitting, however, from the latter, any copy of the copy of the former decree of said United States District Court made and entered July 1, 1913, which is embodied in and forms a part of said mandate. A copy of said former decree shall not be printed in said transcript of record as a part of said mandate, but in the copy of the mandate as printed in said transcript, said former decree may be referred to by reference to the volume and pages of the record on the former appeals taken in said cause wherein a copy of said former decree is set out.

2. If in any statement of the record or statement on appeal which may be prepared by the appellants or any of them they may wish to insert a copy of said mandate in and as a part of said statement, they need not incorporate in said statement of the record or statement on appeal or in any statement of the record or statement on appeal which may be filed by any of them in said cause, a copy of said former decree in said District Court entered July 1, 1913, but they may in said copy of the mandate simply refer to said former decree by reference to the volume and pages of the record on said former appeals wherein a copy of said former decree is set out.

3. This order is without prejudice to the right of the complainant to object to the right of the defendants to take said appeal and to the power of the court of appeals to hear and determine it and is not to be

construed as a waiver of any right the complainant has to object to the defendants taking said appeal or to the Circuit Court of Appeals hearing and determining it or as a waiver of its right to have the court of appeals confine its inquiry on the appeal to the mandate of said Supreme Court and the decree of this court, entered December 9, 1915.

Dated February 1st, 1916.

CHAS. E. WOLVERTON,
Judge of said District Court.

Filed February 1, 1916. G. H. Marsh, Clerk.

The costs which the decree of the District Court provides for were fixed at \$6,249.02, by order of the District Court, as follows:

ORDER TAXING COSTS.

Heretofore and on the 16th day of December, 1915, the complainant, the United States of America, filed herein its duly verified cost bill claiming costs against the defendants Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, in the sum of \$6,249.02 and thereafter and on the 18th day of December, 1915, the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, filed herein their duly verified objections to said cost bill, by which said objections the said defendants objected to the allowance of \$350.00 for the depositions of seventy witnesses:

Thereafter, and on the 27th day of December, 1915, the matter came on regularly to be heard, the objecting defendants being present and represented by William D. Fenton and John M. Gearin of their attorneys, and the complainant being represented by Clarence L. Reames, United States Attorney for the District of Oregon, and the Court having sat and heard the statements and arguments of counsel and having taken the matter under advisement to be passed upon at a later date,

Now, the Court being fully advised in the premises, it is ordered and adjudged that said objections be and the same hereby are overruled and the clerk is directed to tax as costs and disbursements against the said defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, the following items, to wit:

Clerk's fees	\$ 383.75
Marshal's fees	269.47
Attorney's fees	40.00
Depositions of 70 witnesses before special examiner	350.00
Examiner's fees	1,942.50
Witness fees (as appears from the records or the marshal's office and the clerk's office showing payment)	3,263.30
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Total taxed at	\$6,249.02

Done in open court this the 3d day of January, 1916.

CHAS. E. WOLVERTON, Judge.

Filed January 3, 1916. G. H. Marsh, Clerk.

On May 8th, 1916, the appeals from the decree of December 9th, 1915, came on before this court for hearing.

The appellants contended in substance:

I.

The Court erred in adjudging and decreeing, as in paragraph 2 of its decree set forth, "that the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

II.

And more particularly, that the Court erred, in said paragraph two of its decree, in enjoining the defendants "from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands, or in which the mineral or other deposits are found, and from cutting or removing, or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

The Court erred in adding to the term "actual settler," in said paragraph 2, the qualifying phrase "on the land sold to him."

The Court erred in adjudging and decreeing that the defendants and their respective officers and agents be and are by said decree enjoined from selling any of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; also from cutting or removing, or authorizing the cutting or removal of any timber thereon, except in connection with the sale of the land bearing the timber; also from selling any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; also from removing or authorizing the removal of mineral or other deposits therein, except in connection with the

sale of the land containing the mineral or other deposits.

The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as a part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removing or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits.

The Court erred in not holding and decreeing that there was a complete and absolute grant in this case to the railroad company, with power to sell, limited only as prescribed by the Granting Act and Acts.

The Court erred in not holding and decreeing that the language of the grants herein and of the limitations upon them is general, and that it was not competent to the said Court to attach exceptions thereto in its decree.

The Court erred in not holding and decreeing that the terms of the settlers' proviso or clause in the Granting Act and Acts are prohibitive and not compulsory; and in not holding and decreeing that the observance of such terms would consist in refrain-

ing from making sales to other than actual settlers in quantities exceeding 160 acres to any one purchaser, for a price exceeding \$2.50 an acre.

The Court erred in not holding that the company, under a complete and absolute grant to it, with power to sell, limited only as prescribed, might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, and might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.

The Court erred in not holding and decreeing that there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed in the Granting Act and Acts; and erred in not holding and decreeing that there was no obligation imposed upon the railroad company to sell.

The Court erred in not holding and decreeing that the Granting Act and Acts did not impose an affirmative obligation on the railroad company to sell the lands, and in not holding and decreeing that the so-called settlers' proviso or clause in the Granting Act and Acts had application only as and when the railroad company made sales of the land.

The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualifi-

cations as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.

The Court erred in not holding and decreeing that the language of the so-called settlers' clause or proviso in the Granting Act and Acts is not directive, but restrictive only, and that with this exception, so far as the said timber or mineral deposits or other products are concerned, or any or either of them, the grant of the said lands was unqualified.

The Court erred in not holding and decreeing that under the said Granting Act and Acts the railroad company had a discretion of sale and the choice of time and settlers; and further erred in not holding and decreeing that, pending the exercise of such discretion by a sale in accordance with the requirements of the Granting Act and Acts, the said railroad company had a complete and absolute grant of the lands; and was entitled, as of right, to the timber thereon and to the mineral or other deposits therein, and to the products of the soil thereof; and was entitled, as of right, to sell, cut, and remove such timber, or to authorize the cutting or removal of the same, and to remove, sell or otherwise enjoy mineral or other deposits therein, or any products of the soil thereof—subject to any qualifications arising out of the limited injunction referable to the six months' period above mentioned.

The Court erred in not holding and decreeing that the railroad company, so long as it occupied the status of an owner of unalienated lands within the limits of the grant and grants, had all the rights

therein of a grantee in fee simple, including the rights of such grantee to the timber thereon or to the mineral or other deposits therein, or to the products of the soil thereof—subject to any qualification as aforesaid, arising out of said limited injunction.

The Court erred in not holding and decreeing that the provisions of the so-called settlers' proviso and clause in the Granting Act and Acts were not directive, but restrictive only; and erred in not holding and decreeing that, subject to the restriction, the railroad company took the grant and grants with the right to cut timber thereon, or open and work mines therein, or cultivate the soil thereof, and own, sell, use and enjoy such timber, or the products of such mines, or the cultivation of such soil—subject to any qualification as aforesaid arising out of said limited injunction.

The Court erred in not holding and decreeing that timber cut upon the granted lands, while the same remained unalienated in the railroad company, belonged to said railroad company; and likewise as to any minerals extracted therefrom, or any products of the soil cultivated thereon—subject to any qualification arising out of said limited injunction, referable to the aforesaid period of six months.

The Court erred in not holding and decreeing that the railroad company took the lands in question in fee and was accordingly entitled to make any use thereof not in violation of the restrictive covenants found in the so-called settlers' proviso and clause in the Granting Act and Acts, and not in violation of the limited injunction as aforesaid.

The Court erred in making and entering a decree herein in modification and enlargement of the terms of the mandate from the Supreme Court of the United States.

The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself.

The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein; and in adjudging and decreeing that execution issue against the said defendants, or any or either of them, for any costs or disbursements herein.

The Court erred in not holding and decreeing that no costs or disbursements should be recovered herein from the Oregon and California Railroad Company, or the Southern Pacific Company, or Stephen T. Gage, individually and as trustee, or Union Trust Company, individually and as trustee, or any or either of them.

The Court erred in not holding and decreeing that the main contention of the Government, and the one insisted upon in its bill of complaint and at the trial of the cause, was the contention that the so-called

settlers' clause and proviso in the Granting Act and Acts was a condition subsequent; and in not holding and decreeing that the said defendants last named, and each and every of them, were justified and acted of right in resisting such contention, both below and on appeal; and in not holding and decreeing that inasmuch as the said defendants had prevailed in resisting such contention, it was not equitable to tax them, or either of them, with costs and disbursements herein in favor of the complainant.

The Court erred in not holding and decreeing that it was inequitable to impose costs herein in favor of complainant on the said defendants; and in not holding and decreeing that the case here should be disposed of without adjudging costs in favor either of said defendants or of the complainant, leaving each to bear the costs of his or its own side of the litigation.

The Court erred in not making and entering as and for its decree in this cause, and in place and stead of the decree made and entered by it as aforesaid, the decree in the form tendered to it by the said last-named defendants and each and every of them—that is to say, in not making and entering as its decree in said cause, the decree submitted by these appellants to the District Court and set forth in the aforesaid approved statement of the case.

The appellee in substance contended:

1.

That the decree as entered by the lower court is in all particulars in harmony with the mandate of the Supreme Court.

2.

And in this connection that the word "land" or "lands" as used in the granting acts of 1866 and 1870, in the amendatory act of 1869, and in the opinion of the Supreme Court has the same significance, and that if it embraces the timber and minerals as well as the surface in the one case it must in all the others; and further, that it does comprehend not only the surface, but also the timber and minerals in each instance.

**QUESTIONS OF LAW CONCERNING WHICH
THE CIRCUIT COURT OF APPEALS DE-
SIRES THE INSTRUCTION OF THE
SUPREME COURT FOR ITS PROPER
DECISION.**

1. Was the decree of the District Court of December 9th, 1915, in accordance with the opinion of the Supreme Court?

2. If not, should the District Court have made and entered its decree in manner and form as proposed to it by the defendants in the decree submitted by them and set forth in the approved statement of facts?

3. During the continuance of the estate granted by the acts of Congress mentioned in the opinion of the Supreme Court and while the grantees thereof and their successors in interest retain the same, have such grantees or their successors in interest, within the decision of the Supreme Court, the right to cut or remove or to authorize the cutting or removal of the timber thereon, or to remove or authorize the

removal of mineral or other deposits therein or to sell the timber thereon or the mineral or other deposits therein, apart from the sale of the land bearing the timber or containing the mineral or other deposits—except as such right is suspended pending the Congressional action referred to in the decision?

4. Is the expression, “all the value the granting acts conferred upon the grantees,” or anything else in the decision of the Supreme Court contained, to be taken as meaning that said grantees and their successors in interest have only an equity in the proceeds of the sales of the lands in question to the extent of the statutory selling price thereof.

5. Does the decree of the District Court conform to the mandate of the Supreme Court in the insertion in the second paragraph of such decree of the following:

“And from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits?”

6. Does the decree of the District Court conform to the mandate of the Supreme Court in failing to

make provision for the termination of the injunction contained in the decree in the event that Congress shall make provision as therein provided?

7. Were costs properly taxed in this case against the defendants or any or either of them?

WM. B. GILBERT,
ERSKINE M. ROSS,
WM. H. HUNT,

Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, California, this 12th day of May, A. D. 1916.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

OREGON & CALIFORNIA RAILROAD CO. ET AL.,	} No. 492.
v.	
UNITED STATES.	

*UPON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.*

MOTION FOR CERTIORARI AND TO ADVANCE HEARING.

Comes now the Solicitor General and moves:

1. That a writ of certiorari issue to the Circuit Court of Appeals for the Ninth Circuit to bring the case in its entirety before this court.

2. That the certificate of the said Circuit Court of Appeals on file herein, dated May 12, 1916, together with the record upon which the cause was formerly considered and decided by this court, be taken as a sufficient return to such writ of certiorari.

3. That thereupon the cause be advanced for early hearing.

STATEMENT.

This suit was brought pursuant to a joint resolution of Congress for the purpose of determining the respective rights of the United States and the Oregon & California Railroad Co. and others in and to large and valuable bodies of land in Oregon and Washington, which, subject to certain restrictions, had been granted by Congress in aid of railroad construction and settlement. From a final decree of forfeiture entered against them by the District Court, the Oregon & California Railroad Co. and the other appellants whose claims are involved in these present proceedings, as well as numerous other parties whose claims have now been fully disposed of, appealed to the Circuit Court of Appeals for the Ninth Circuit. By certificate and certiorari the whole cause came to this court, and after full consideration was decided in June, 1915.

Oregon & California Railroad Co. v. United States, 238 U. S. 393.

In disposing of the matter this court held that the grants were not subject to forfeiture, and that the decree of the District Court was therefore erroneous, but that the restrictions set forth in the granting acts, namely, that the grantee must sell the land to actual settlers only in quantities not greater than one-quarter section to one purchaser, and at a price not exceeding \$2.50 per acre, were

obligatory and enforceable as covenants. Furthermore, it declared in its opinion (p. 438):

This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Thereupon it ordered that the decree of the District Court be reversed and the cause remanded for further proceedings in accordance with the

opinion. The mandate was issued accordingly, and on December 9, 1915, a decree was entered by the District Court (R. 13) which purports to follow it. The injunctive provisions of this decree, like the mandate, aim at two distinct objects; first, to forbid further violations of the covenants, and, second, to preserve the property wholly intact for a reasonable time in order to afford opportunity for further legislation by Congress. In carrying out the first of these objects the decree (par. 2), in substance, forbids sales of the land to persons other than actual settlers, or in quantities greater than one-quarter section to one purchaser, or for prices exceeding \$2.50 per acre; and also forbids the sale or cutting or removal of any timber, and the sale or removal of any mineral or other deposits except in conjunction with legitimate sales of the lands upon which such timber or deposits shall be found.

For attaining the second object—preserving the status of the property until Congress might act—the decree (par. 3) forbids any direct or indirect disposition of lands, timber, or mineral, or other deposits, the cutting of timber, the removal of it or of mineral or other deposits, and all interference and intermeddling with any moneys which arose or may arise from the lands and which are or may be on deposit awaiting the final decision of this court in this case—

until Congress shall have a reasonable opportunity to make provision by legislation

for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.

The decree of the District Court also provides that if Congress fails to make provision for the disposition of the said lands, money, timber, mineral and other deposits, the defendants may apply to that court within a reasonable time, not less than six months from the entry of the decree, for a modification of so much of the injunction as forbids any disposition of the said lands, timber, etc., until Congress shall act, and the court reserves the right to modify the decree in that regard and upon such application if, in its opinion, good cause should then exist for so doing.

The decree also taxed costs and disbursements against appellants and in favor of the complainant in the sum of \$6,249.42.

From this decree the defendants and appellants, on January 8, 1916, took an appeal to the Circuit Court of Appeals.

The errors assigned and argued in the briefs filed in the Circuit Court of Appeals include the following questions, viz:

1. Whether the decree erroneously exceeds the directions contained in the mandate.

2. Whether in that portion of the decree which forbids further violations of the covenants, it was erroneous to forbid selling, cutting and removing of timber and selling and removing of mineral or other deposits, apart from the sale of the land bearing or containing the same.

Here appellants argue that the timber (which constitutes the chief value of the remaining lands) is the absolute property of the railroad company and may be used or disposed of at its discretion, with no limit or restriction whatsoever, save possibly such as might be inferred to avoid diminishing the availability of the land for cultivation by settlers. They make a similar argument regarding possible deposits of mineral.

3. Whether that portion of the decree (par. 3) which, following the mandate, aims to afford reasonable opportunity for legislation by Congress, improperly included with the lands the timber and minerals, etc., and such moneys as have been or may be deposited to await the final decision of this case by this court.

4. Whether, without regard to the scope of the mandate, the District Court, or this court, had jurisdiction to forbid disposition of timber for any period of time to await legislation by Congress.

This question is raised in one of the briefs but not specifically by the assignments of error.

5. Whether it was erroneous to impose costs on the appellants.

All of the foregoing questions, except the fourth, reappear, in various forms of statement, in the list of questions certified by the Circuit Court of Appeals (R. 80).

That court also asks (question 6) whether under the mandate the District Court should have made provisions "for the termination of the injunction contained in the decree in the event that Congress shall make provision as therein provided."

On June 9, 1916, six months from the entry of the District Court's decree, the President approved an act of Congress (Public, No. 86, 64th Congress) entitled "An act to alter and amend [the granting and amendatory acts, naming them], and for other purposes," of which act it is assumed the court will take judicial notice.

This was the result of elaborate hearings before the Committees of the House and Senate on Public Lands, and full report made by those two bodies to the two Houses respectively. In a series of recitals, it refers to the restrictions in the granting acts, the wilful violation thereof by the railroad company, the decree of this court, the provisions in the granting act of July 25, 1866, allowing alteration, amendment or repeal, and the fact that the railroad company and its predecessors in interest "received a large sum of money from sales of said land for prices in excess of \$2.50 per acre, and from leases, interest on contracts, and so forth"; although "the aforesaid granting acts conferred

upon the said railroad company the right to receive not more than \$2.50 per acre for each acre of land so granted." It thereupon provides, comprehensively and specifically:

1. For the immediate revesting in the United States of the title to all the lands for which patents had been issued or earned under the granting acts, except those which had been sold by the railroad company prior to July 1, 1913 (the date of the District Court's original decree of forfeiture), and except those constituting the railroad right of way and those in actual use by the company prior to December 9, 1915 (date of the District Court's last decree), for depots and other specified railroad uses.

2. For the classification of the lands into power site lands, timberlands, and agricultural lands, by the Departments of Interior and Agriculture.

3. For the use and disposition of power site and mineral lands in accordance with the general laws concerning public lands of like character; for the sale of the timber on the lands classified as timberlands through competitive bidding, "as rapidly as reasonable prices can be obtained therefor in a normal market;" for the settlement, cultivation, and purchase at \$2.50 per acre of the lands classified as agricultural, under the homestead laws as modified by this act; and for a similar disposition, omitting the money charge, of the lands classified as timberlands after the timber shall have been removed from them.

Certain of the lands affected by the act are declared to be withheld from entry or other disposition for a period of 2 years after its approval (sec. 5, bottom). These lands, we understand, consist of sections necessary to protect the water supply of certain cities, and the withdrawal was intended to afford them an opportunity to acquire the lands.

4. For vesting in the United States forthwith of "the title to all money arising out of said grant lands and now on deposit to await the final outcome" of this suit.

5. For the deposit of all moneys received from or on account of the lands and timber under the act in a special fund to be designated "the Oregon and California land-grant fund."

6. For the payment "as soon as may be after the approval of this act" by the Treasurer, upon the order of the Secretary of the Interior, of "the taxes accrued and now unpaid on the lands revested in the United States," for which purpose the act appropriates the necessary money.

7. For the ascertainment and determination, through judicial proceedings to be instituted by the Attorney General, of "the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of said granted lands, whether sold or unsold, patented or unpatented, and which should be charged against it as a part of the 'full value' secured to the grantees

under said granting acts as heretofore interpreted by the Supreme Court," in the ascertainment of which amount the court "shall take into consideration and give due and proper legal effect to all receipts for money from sales of land or timber, forfeited contracts, rent, timber depredations, and interest on contracts, or from any other source relating to said lands; also to the value of timber taken from said lands and used by said grantees or their successor or successors," and shall also determine "the amount of the taxes on said lands paid by the United States, as provided in this act, and which should in law have been paid by the said Oregon & California Railroad Co., and the amount thus determined shall be treated as money received by said railroad company."

8. For the ascertainment by the Secretary of the Interior, as soon as may be, of the acreage of the lands, whether sold or unsold, which the beneficiaries have received or are entitled to receive under the grants, and the value of such acreage at \$2.50 per acre, and for the payment of that value, less the amount chargeable to the railroad company and its predecessors as found and determined in the judicial proceedings, to the railroad company, its successors or assigns, and to lienors as their respective interest may appear, the payment to be made in instalments from time to time, out of the special fund as it accumulates, by the Treasurer of the United States upon the order of the Secretary

of the Interior; and it being further provided: "That if, upon the expiration of ten years from the approval of this act, the proceeds derived from the sale of lands and timber are not sufficient to pay the full amount which the said railroad company, its successors or assigns, are entitled to receive, the balance due shall be paid from the general funds in the Treasury of the United States, and an appropriation shall be made therefor."

9. For depositing the further proceeds from the sales of land and timber, after so satisfying the railroad company and the lienors, partly in the State and county funds for schools, roads, etc., and appropriating the remainder for the United States.

The above résumé is general in character, aiming only to explain the important features of the legislation which bear relation to the issues involved in this litigation.

On or about June 30, 1916, the appellants served upon the Congress, through its presiding officers, and upon the President, the Secretary of the Interior, the Secretary of Agriculture, the Attorney General, and the Treasurer of the United States, a notice in writing claiming and asserting that this act is unconstitutional, null and void, declaring that the appellants do not assent to or acquiesce in any of its provisions, and protesting against the assertion by the United States of any claim to the lands or to any moneys derived therefrom, and the taking by the United States of any action or pro-

ceeding for the purpose of carrying out the act in any of its provisions; and further protesting against the making by the Secretary of the Interior of any order for the payment of taxes on the lands, and against the payment of any such taxes by the Treasurer, as provided by said act, etc.

Since the passage of the act the work of classifying the lands as thereby required has been proceeding rapidly. The Land Department reports that thousands of acres have already been classified, and that numerous applications for sales of timber are already on file and subject to be acted upon as soon as the work of ascertaining the amounts of accrued taxes (now well advanced) can be concluded, and the taxes paid. The taxes claimed by the States exceed a million dollars.

REASONS FOR THE MOTION.

1. The act of June 9, 1916, assuming it valid, has rendered moot every specific question presented by the certificate save the question of costs. By its operation the Government has now taken over the title to the land, with all its timber and other resources, and also the moneys on deposit which are mentioned in the District Court's decree. The interest of the railroad company is no longer an interest in these things, but an interest in obtaining prompt adjudication, settlement and payment of its monetary claim, through the methods, including,

if necessary, the money appropriation, for which the act provides.

2. The general questions certified, viz, whether the decree of the District Court accords with the mandate, and whether a decree should have been entered in manner and form as proposed by the appellants (R. 80, 11), though they amount to a submission of the entire case as it was before the act was passed, seem not to empower this court to deal fully and finally with the existing situation. Should those questions be answered without regard to the act, new controversies concerning its validity and meaning would be precipitated in the lower courts which must finally come here after much expensive and embarrassing delay. On the other hand, should this court consider the validity and effect of the act, but merely in connection with a disposition of the questions certified, the ensuing decree of the Circuit Court of Appeals would doubtless be appealed from and the act and its meaning would again become involved before this tribunal.

3. If, as the Government insists, the act is valid, probably a modified decree should now be directed, so that the injunction may be made absolute and the moneys on deposit be delivered to the proper governmental depository. If it be in any regard invalid, the nature and extent of such invalidity, and the time during which the property may be held intact pending further legislation, should be

conclusively determined by this court without the intervention of useless proceedings in the lower courts.

4. The Government and the States and local communities where the lands are situated are deeply concerned in the prompt and conclusive dissipation of any possible doubt concerning the validity of the act of Congress. If the act be invalid, that fact should be known before further important steps are taken in its administration, before sales are made or settlements allowed and the money of purchasers and settlers is accepted, before large additional expenditures of public money are incurred, in the payment of taxes, or in work of investigation, and before the institution of the new legal proceedings which the act directs.

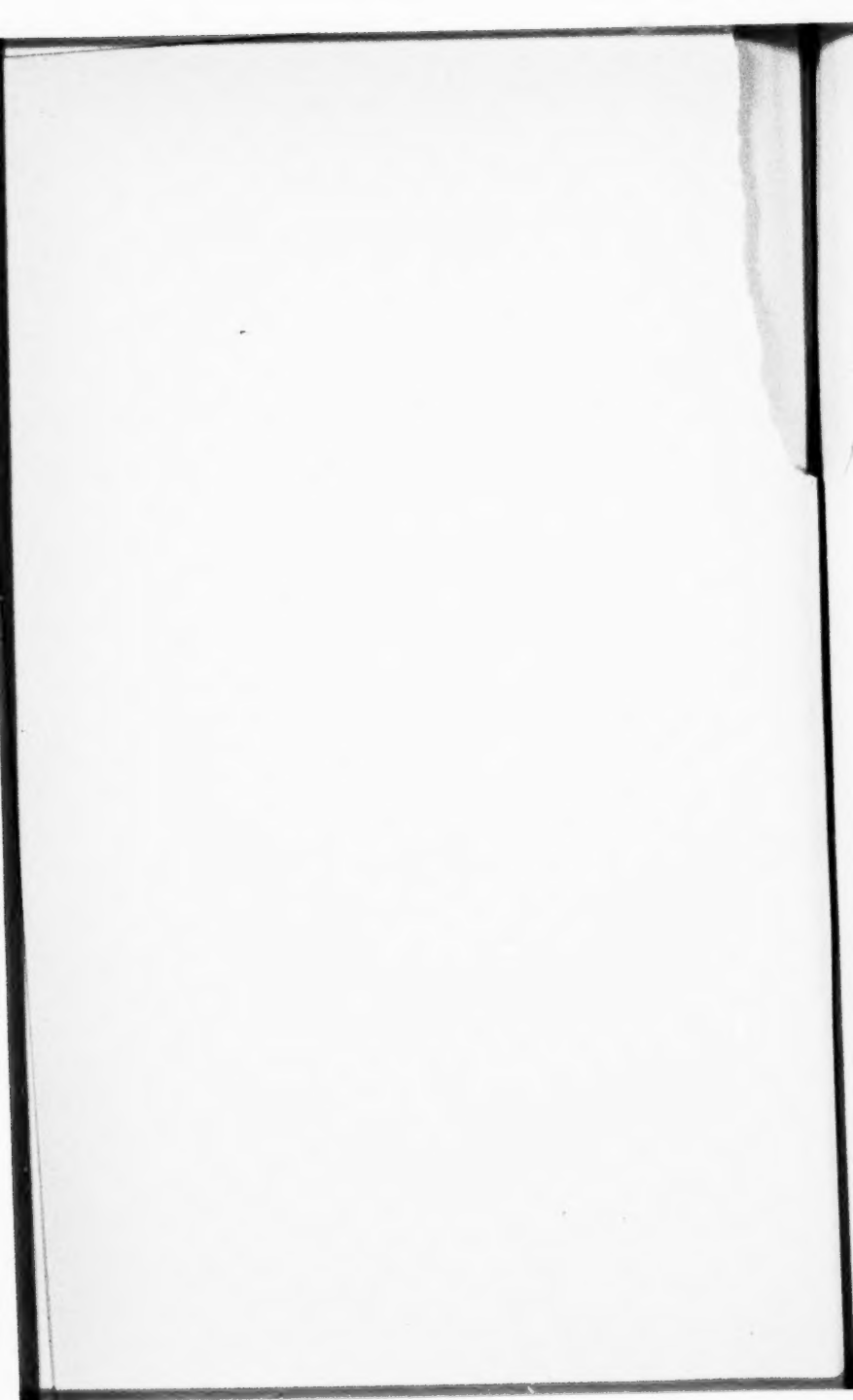
Respectfully submitted.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1916.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

*CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.*

OREGON AND CALIFORNIA RAIL-
ROAD COMPANY, a Corpora-
tion, et al.,

Defendants and Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

**Brief for Defendants and Appellants, Oregon and
California Railroad Company, Southern Pacific
Company, and Stephen T. Gage, individu-
ally and as trustee.**

STATEMENT.

This case, the Oregon Land Grant Case, is now here for the second time. It came here the first time from the Circuit Court of Appeals for the

Ninth Circuit on certificate and certiorari; the cause was heard in its entirety; and the opinion of this court, announced by Mr. Justice McKenna, is reported in 238 U. S., pages 393-439.

The decree below was, by this court, "reversed and cause remanded to the District Court for further proceedings in accordance with this opinion".

On return of the cause to the District Court of Oregon, a decree was therein entered on December 9, 1915, as a sequel and in assumed pursuance of the mandate of this court. This decree, as appellants saw it, was not in accordance with the mandate. In their view, it went beyond the mandate of this court; it decided and assumed to conclude matters in excess of the mandate; more specifically, it undertook to impose a construction upon the rights of these appellants in respect to the timber and the mineral content of the land grant in question, not warranted, it is believed, by the opinion and mandate of this court. Appellants accordingly took the case by appeal to the Circuit Court of Appeals for the Ninth Circuit; and from that court, by certificate and certiorari, the cause is brought here for the second time.

A land grant was made in 1862 to the Union Pacific and Central Pacific Railroads, in aid of the construction of a transcontinental railroad from the Missouri River to San Francisco Bay on the Pacific Ocean. The extension of that trans-continental railroad from some point in California, fixed at

Roseville, near Sacramento, northward through California and Oregon to the City of Portland, was in the mind of Congress in 1866; and in that year a land grant was made in aid of the construction of such a railroad. So much of the land as lay within the State of Oregon, was granted to such company as should be designated by the Oregon Legislature, and upon that company was laid the burden of building the road from Portland south to the interstate line between Oregon and California. The Act of 1866 was amended in 1869, and in 1870 an additional act was passed granting land in aid of the construction of a railroad from Portland by way of Forest Grove to tidewater at Astoria on the Oregon Coast, and in a southerly direction to McMinnville, an Oregon point. The land embraced in the Act of 1866, as amended in 1869, and in the Act of 1870, is the Oregon land grant.

The act of 1866, as it was amended in 1869, provided,—and much the same provision, in terms, was in the act of 1870,—“that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding \$2.50 per acre.” But the Acts of 1866 and 1869 and of 1870 were relatively slow in arriving. The Pre-emption Law of September 4, 1841, the Oregon Donation Act of September 27, 1850, and the Homestead Law of May 20, 1862, had gone before.

The valley lands, adaptable for settlement and falling within the primary limits of the railroad grant, had been taken up under these earlier statutes. The railroad company was put to it to find its lands within the indemnity limits of the grant,—not valley lands these, but in great part mountain forests. Some land there was, susceptible of cultivation, not a great deal of it, and this the railroad company, in the earlier years of the grant, disposed of for settlement, as contemplated by the settlers' clause of the granting act. Later, and when the timber began to take on value, the company made sales of the timbered land—for lumber was soon to become, as it did, the principal industry of the state,—and those sales, naturally, were in larger quantities than the small parcels of the settlers' clause, and at somewhat higher prices, and not to farmers but to lumbermen. These transactions, in departure from the literal requirements of the settlers' clause, were open and above board. They were the only practicable way of making the grant responsive to what this court has held to be the primary purpose of the act, namely, to aid in the construction of a railroad; they were matters of common knowledge; they were matters of public record; they were known to the people of the state, to the courts of the state and of the nation, to the Land Department and the executive government and to both houses of Congress. They were reported with the utmost particularity of transaction, in

respect to the location and quantity of the lands sold and the prices paid, to a bureau of the Land Department specially constituted for the purpose of receiving and acting on such information, and this information, in all its particularity, was transmitted to the Secretary of the Interior, and by him to the President, and by the President to both houses of Congress, and was there referred to the appropriate committees and perpetuated as executive documents; and this information was so communicated and transmitted yearly and half-yearly during a period of twenty-five years, and in pursuance of the act of Congress of 1879 precisely calling for the information. Everything that was done by the railroad company in dealing with these lands, was in the light of day, and went on for over a generation, indeed for nearly forty years, without objection from the State of Oregon, without objection from the Land Department or the Executive government or Congress. If a railroad company was ever justified, or the stockholder who put his money into it, or the bondholder who loaned his money to it, in believing that a course of conduct had been ratified by general acquiescence, and a departure from the literal and exact language of a statute had been waived and assented to, the case at bar is a revealing instance.

Indeed, Congress, at no time, of its own initiative, called into question the course of dealing with these lands by the company. It was a memorial of the

Legislature of Oregon, procured by interested parties to be adopted in the year 1907, and complaining of the temporary withdrawal by the railroad company of these granted lands from sale,—upon the ground, as stated in the bill, “of the great injury inflicted upon *commercial* and *industrial* conditions,”—that moved Congress to take action. The Attorney-General was authorized by joint resolution, to proceed against the company, and the suit in equity, now pending, and of which this appeal is a phase, then followed.

It will be recalled that the first appeal was taken from the decree of the District Court of Oregon, forfeiting the title of the company to the granted lands, as for a breach of the settlers' clause, construed in that court to be a condition subsequent. Upon a certificate of questions from the Circuit Court of Appeals to this court, the whole record was ordered up and the case was considered and decided at large. It was held here that the settlers' clause was not a condition subsequent, that it was a covenant only, enforceable by injunction. The decree of the District Court of Oregon was reversed, and the cause was remanded to that court for further proceedings in accordance with the opinion of the Supreme Court. It is the decree entered by the District Court in such further proceedings, that the pending appeal now brings in question, and for the reason, as it is submitted, that the decree is not in accordance with the opinion of the Supreme Court.

This court has ruled that "there was a complete and absolute grant to the railroad company, with power to sell, limited only as prescribed" by the settlers' provisos. (238 U. S., pp. 434-5) And as to these provisos, it was said by this Court: "Their language is not directive, it is restrictive only; and with this exception the grant is unqualified." (238 U. S. p. 432)

Upon the fullest consideration, it was determined here that the settlers' proviso was not a condition subsequent, that it was a covenant, and the forfeiture of the railroad company's estate was reversed. Injunctive relief, as being appropriate to the provisos, in their character of covenant, was awarded—"an injunction against further violations of the covenants". (238 U. S., p. 436) A temporary restraining order was also made—six months being the period indicated—with the object, as the Government's motion for certiorari puts it, of "preserving the status of the property until Congress might act". The language of the opinion (238 U. S., p. 438) is as follows:

"The lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever, or of the timber thereof, and from cutting or authorizing the cutting or removal of any of the timber thereon, *until*

Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads."

"If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein for a *modification* of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the Court in its discretion may modify the decree accordingly."

The decree of the District Court enjoins the railroad company from sales of the granted lands in violation of the covenants—a general and permanent injunction, so far forth in pursuance of the mandate, but as to the timber and minerals of the granted lands, the decree is not limited to the scope of a temporary restraining order as required by the opinion of this court. It goes farther, it forbids the exercise by the grantee at any time of any right of ownership in respect to the timber or minerals of its land. It denies to the owner of the land any use or benefit of the timber or the minerals; it accords a bare permission to transfer the timber and the minerals along with the land, when a sale is made of that land to a settler pursuant to the

proviso. But such a transfer of timber and minerals would not need a decree; it goes without saying; the unsevered timber as such, the unextracted mineral, is part of the realty. In effect, therefore, and not temporarily but for good and all, this decree obliterates all rights of the owner of a "complete and absolute grant", in the timber and minerals of the granted land.

The decree, however, is not the last word. On June 9, 1916, Congress passed the Ferris Act, forfeiting the railroad's title to the granted lands. It is true, the harsh word, "forfeited," is not employed; "revested" is the term used; "the title" is declared to be "revested in the United States". (Sec. 1) Even "a mere naked trust or power to dispose of the lands in the manner specified (in the granting act) and to apply the same to the use and purpose therein described", (*Rice against Railroad Company*, 1 Black 358, 381) is denied the railroad.

The revested grantor attends to all that, and in its own way. It sells the timber as such; (Sec. 4) it disposes of the minerals as such; (Sec. 3) and to the extent that the land, cleared of its timber or exploited of its minerals, has become susceptible of agricultural treatment, it proposes to sell it to settlers. (Sec. 5) For the grantee who built the road and earned the land and received the patents for it, and upon whom the granting act imposes the perpetual burden of transporting the grantor's troops and property, free of toll, a shadowy provi-

sion is reserved. It is to receive from its grantor a sum of money for its divested title, figured at \$2.50 per acre of the granted lands, patented and unpatented, but after deductions and on time. (Secs. 7-10) The deductions include "all receipts of money from sales of land or timber, forfeited contracts, rent, timber depredations, and interest on contracts, or from any other source relating to said lands, also the value of timber taken from said lands and used by said grantees, or their successor or successors"; also "the amount of the taxes on said lands paid by the United States, as provided in this act, and which should in law have been paid by the said Oregon and California Railroad Company." (Sec. 7) The balance, if any, surviving this process, is payable on time, out of such moneys as may be "received from or on account of said lands and timber under the provisions of this act". (Sec. 10) This legislative decree does not contemplate a present payment for the enforced resumption of title. The railroad company must bide its time and for years. "Payments shall be made from time to time", it is declared, "as the fund accumulates, by the Treasurer of the United States, upon the order of the Secretary of the Interior: provided, however, that if, upon the expiration of ten years from the approval of this act, the proceeds derived from the sale of lands and timber are not sufficient to pay the full amount which said railroad company, its successors or assigns, are entitled to receive, the

balance due shall be paid from the general funds in the Treasury of the United States". (Sec. 10.)

The six months period, fixed by the temporary restraining order of this court, has now only an academic interest. It expired long since. The stress of the second decree of the District Court of Oregon is on the timber rights and mineral rights of the grantee. It extinguishes them. But whether it went beyond the mandate of this court and the right of the matter in so doing, becomes a mere moot question, an abstract proposition, if it was competent to Congress by the Ferris Act, to resume the title to the land without the consent of its owner.

"The duty of this court", it was said in *Mills* against *Green*, 159 U. S., 651-653, "as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8

How. 251; *California v. San Pablo & Tulare Railroad*, 149 U. S., 308". (See also *Campbell v. California*, 200 U. S., 87, 90-93; *United States v. Hamburg American Company*, 239 U. S., 466, 475-6.)

This court will now determine, it is believed, "whether the enactment of the subsequent statute",— (*Campbell v. California*, *supra*.) of the Ferris Act, in the case at bar, was a constitutional exercise of the power of Congress. "If the act be invalid", said the Government in its application for certiorari in this case, "that fact should be known before further important steps are taken in its administration, before sales are made or settlements allowed and the money of purchasers and settlers is accepted, before large additional expenditures of public money are incurred in the payment of taxes or in work of investigation, and before the institution of the new legal proceedings which the act directs".

ASSIGNMENT OF ERRORS.

Errors have been assigned to the decree below on the part of the Oregon and California Railroad Company, on the part of the Southern Pacific Company, on the part of Stephen T. Gage, individually and as trustee, and on the part of the Union Trust Company, individually and as trustee.

The assignments of error for these four appellants are, it will be readily understood, substantially identical. It would serve no useful purpose to repeat these assignments at this point, in view of the

argument which follows, and in which they are gathered up. It will only be necessary to say, we venture to think, that they all turn, with more or less particularity and variation of form and expression, on the fundamental contention that the District Court erred in exceeding the mandate of this court. The further contention now comes in, that the action of the District Court does not raise a mere moot question, and this for the reason that the Ferris Act is invalid. The District Court, it may be added, adjudged costs in the sum of \$6,249.-02 against these appellants, and to its action in that regard error is assigned.

I.

THE DISTRICT COURT ERRED IN EXCEEDING THE MANDATE OF THIS COURT.

Decree of the District Court—its terms and scope examined in the light of the opinion of this court.

The contention of the government that the settlers' clause is a condition subsequent, entailing a forfeiture for its breach, was rejected by this court. The cross-complainants, alleging themselves to be "actual" settlers upon the land, and the interveners, alleging themselves to be "constructive" settlers upon the land, made the contention that they had rights in the land as beneficiaries of a trust which the railroad company, as trustee, should be constrained to execute—that contention was rejected. The settlers' provisos were held to be covenants,

enforceable by an injunction against future violations of the same. We give the words of the opinion, 238 U. S., at page 436: "Rejecting, then, the contention of the government, and the contentions of the cross-complainants and interveners, and regarding the settlers' clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the District Court, of course; and clearly an *injunction* against *further* violations of the covenants."

That the injunction contemplated was in the nature of a restriction upon the *future* conduct of the railroad company, is again brought out at the same page of the opinion. The court is referring to the disregard of the covenants, to the gains received by the company in excess of the legal or statutory price as fixed by the settlers' clause, and it goes on to say: "In view of such disregard of the covenants and gain of illegal emolument, and in view of the government's interest in the exact observance of them, it might seem that *restriction* upon the *future* conduct of the railroad company and its various agencies is imperfect relief; but the government has not asked for more."

And again, at page 437 of the opinion, the court says: "However, an injunction simply against *future* violations of the covenants, or to put it another way, simply mandatory of *their requirements*, will not afford the measure of relief to which the facts of the case entitle the government."

It is not to be assumed, however, for a moment, that the court, in holding the provisos to be covenants, enforceable by injunction and that an injunction should go against future violations of them, decided, or meant to decide, that these covenants were directive to the grantee or imposed any obligation upon it to make sales of the lands, or were other than restrictive in character—restrictive, in the sense that if the railroad company exercised its option to make sales of the granted land, it was restricted in such sales, so far as purchasers were concerned, to actual settlers; so far as quantities were concerned, to a maximum of 160 acres to each purchaser; and so far as price was concerned, to a maximum of \$2.50 an acre. An injunction, enforcing the covenants to the extent and by the measure of these restrictions, was the injunction which the court had in mind.

To illustrate: The court, at pages 417-418 of the opinion, is meeting the argument of the government that the railroad company had made a breach of the provisos and was amenable to a forfeiture. "In its argument at bar," says the court, "the government insisted that it was the duty of the railroad company to have provided the machinery for settlement, and, by *optional* sales, guarded by probational occupation of the lands, to demonstrate not only initial, but the continued, good faith of settlers; and that the omission to do so was of itself a breach of the provisos, and incurred a forfeiture

of the grants. "But when", the court continues, "did such obligation attach? Before or after the construction of the road—construction in sections, or completely? The contention encounters *the government's admission that there was no obligation imposed upon the railroad to sell*. And we have the curious situation—which is made something of by cross-complainants and interveners in opposition to the government's contention,—of the right of settlers to buy, *but no obligation on the railroad to sell*, and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes."

The court rejects, as well, an argument made for the grantee that the covenants, expressed by the provisos, were not enforceable because of their lack of certainty, repugnancy to the grant, and impossibility of performance. The court saw, in the sales made in earlier years to settlers of some hundred and sixty-three thousand acres of the granted land, a demonstration so far forth of the certainty and practicability of the provisos; and it went on to show that, while these provisos imposed no affirmative duty upon the railroad company to make sales, yet when sales were in point of fact made, it was the duty of the railroad company to make those

sales within the limitations and prohibitions of the covenant. After referring to the example of these early sales to settlers, the court says, at pages 421-2 of the opinion, "The demonstration of the example would seem to need no addition. But passing the example, *as it may be contended to have some explanation in the character of the lands so disposed of*, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast *in language of limitation and prohibition*; the sales are to be made *only* to certain persons and *not exceeding* a specified maximum in quantities and prices. If the language may be said not to impose 'an affirmative obligation to people the country' it certainly imposes an obligation not to violate the limitations and prohibitions *when sales were made*; and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant *as restrictive*, the 'jurisdiction of a court of equity upon a breach or threatened breach of the covenant, to enforce performance by enjoining a violation of the covenant cannot be doubted.' Apposite cases are cited to sustain the admission, and in answer to the *contention of the government that it could recover no damages for the breach* and hence had no enforceable remedy but forfeiture, it is said: 'But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of

public character and such that no damage could be calculated is an added reason for the intervention of equity.' And cases are adduced."

The opinion now proceeds: "*We concur in the reasoning, and give it greater breadth in the case at bar than counsel do.* They would confine it, or seem to do so, to the compulsion of sales of land *susceptible of actual settlement*, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken *as they were given*. Assent to them was required and made, and we cannot import a *different measure* of the requirement and the assent *than the language of the act expresses*. It is to be remembered that the acts are laws as well as grants and must be given the exactness of laws."

Again, at page 428, the court says: "The character of the lands furnished no excuse. *It might have justified non-action*, but it did not justify antagonistic action."

Again, at page 432, the court can see no merit in the claim of the interveners, who were mere constructive or potential settlers, under a statute dealing with actual settlers. "The word 'actual,' " the

court says, "expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos, it would seem that interveners' claims to be beneficiaries of the trust, if there is a trust, must be refuted." But as to the cross-complainants, alleging themselves to be actual settlers, the argument, under a statute dealing with actual settlers *eo nomine*, is more difficult, and the considerations are more appealing; and this leads the court to re-affirm its interpretation that these provisos are restrictive merely, not directive.

Said the court (p. 432): "The cross-complainants present arguments of more difficulty, supported by appealing considerations. 'Actual settlers' are the words of the provisos, and we may assume actual settlers were contemplated, and sales of the lands were *restricted* to them; but how were actual settlers to be ascertained and by whom? And was there a *compulsion or option* as to sales? There could not be an absolute right to settle or purchase *unless there was an absolute compulsion to sell*. The acts of Congress omit regulation. *Their language is not directive; it is restrictive only*. With this exception, *the grant is unqualified*." But the court says further (pp. 432-3): "There is plausibility in the argument which represents that if the provisos be held to give to the railroad a *discretion of sale, the choice of time and settlers*, their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting

the lands to development, retain them in monopoly and a kind of mortmain."

"We feel the strength of the argument *but cannot yield to it*. There are countervailing ones. We have already indicated that *nothing can be deduced from the imperfections of the granting acts*. Indeed, the argument of cross-complainants, like a great many other contentions in the case, get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants, settlements were normally made and the railroad, *in the exercise of its discretion*, responded to such settlement by sales to settlers."

Again, pointing to the withdrawal of the granted lands from the operation of the public land laws and to the resulting differentiations, the court says (p. 434): "The public land laws had tests of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were *withdrawn from those laws* and primarily devoted to another purpose, they were *committed to another power*, to be administered for such purpose; *and a discretion in the exercise of the power*, within the restriction imposed, was necessarily conferred."

And finally, at pages 434-5 of the opinion, the court says: "There was a *complete and absolute grant* to the railroad with power to sell, *limited only as prescribed*, and we agree with the government that the company 'might choose the actual

settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.' And we add, it might choose the time for selling, or its use of the grants as a means of credit, subject *ultimately* to the *restrictions* imposed".

It is abundantly clear from the decision of this court, that the language of these provisos "is not directive, it is restrictive only;" and that the obligation imposed upon the company is "an obligation not to violate the limitations and prohibitions *when sales were made.*" The absolute grant to the railroad company carried the "power to sell, *limited only as prescribed.*" The company, as the government itself argued, and as the court agreed, "might choose the actual settler, might sell for any price not exceeding \$2.50 an acre, might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres;" and more than that, as the court explicitly held, "it might choose the time for selling."

There can be no misunderstanding of the position of the court as to whether there was "a compulsion or option as to the sales." The same thought was expressed in *Nichols v. Southern Oregon Co.*, 135 Fed., 233, where the Court said, speaking of a similar provision:

"The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the state, (the grant being

to the state directly) subject to restrictions as to the price at which they should be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the state was required to observe in selling the granted lands, at such time after they were earned *as the state should conclude to sell them.*"

And in the Government's brief on demurrer to the bill, in the case at bar, it was said, at page 154:

"The terms of this proviso are prohibitive and not compulsory; that is, it prohibits sales except within the maximum limits imposed. Each of the limitations is in the negative form — 'actual settlers', quantities 'not greater', prices 'not exceeding'."

And at page 226 of the same brief the Government says:

"In the case at bar observance of the condition would consist in refraining from making sales to others than actual settlers, in quantities exceeding 160 acres to any one purchaser for a price exceeding \$2.50 an acre. The thing prohibited was specifically stated in language which is not susceptible of any doubt or uncertainty."

An injunction, therefore, "against *future* violations of the covenants," as decreed by the court, once the covenants, as construed by the court, are understood, is not difficult to appreciate. It does not

import or imply a direction to the company to make sales, for the covenants were not directive. It does import a restriction upon the company, for the covenants were restrictive. It subjects the grantee to a restriction, "when sales were made," made not under "compulsion" but at the "option" and in the "discretion" of the grantee, that such sales should not violate the limitations and prohibitions of the provisos—that they should not be made except to actual settlers, that they should not be made in quantities to exceed 160 acres, and that they should not be made at prices in excess of \$2.50 an acre. A decree for such an injunction, would be a decree in accordance with the opinion of the court.

One thing, however, was quite clear to the court—that the settlers' clause was a settlement clause; that it was not passed for the benefit of timber speculators. The restriction on the railroad company, in making sales of forest land insusceptible of settlement, and chiefly valuable for timber, at a maximum price of \$2.50 an acre, would be virtually an invitation to the timber speculator, under the guise of a settler; the railroad company would be limited to that constituency for its purchasers; and the Congressional policy and intent would be defeated. Some measure of relief the government—and as well the grantee—was entitled to, appropriate to that situation.

The decree of this court vindicates the title of the grantee in explicit and emphatic terms. But

it seems to have been conceived by the court, on a view of the whole case, that the temporary restraining order, keeping the subject matter *in statu quo*, was an equitable condition to annex to its decree, in aid of such amendatory legislation, competent to Congress, as, consistently with the rights of the grantee, might afford relief from unworkable requirements.

"The Court" said Chief Justice Marshall, in *Polk v. Wendall*, 9 Cranch, 87, 99, "may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant".

The court makes no suggestion as to the character of this amendatory legislation, except that it is careful to say that any action by Congress in the premises must "secure to the defendants *all the value the granting acts* conferred upon the railroads." It will be convenient and aidful to quote the language of the opinion at pages 437-9:

"The Government alleged in its bill that more than 1000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering, the defendants averred that such applications were made by persons who desired to obtain title *on account of the timber* and not otherwise, and *for the purpose of speculation only* and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the

timber thereon and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of homes thereon at no time 'exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding \$2.50 per acre.'

"A great deal of testimony was introduced, consisting not only of that of witnesses but of maps, photographs, reports and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, *even from the Government's summary of the evidence*, that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, *for our present purpose* we may accept the assertion of defendants; and we have seen that Congress extended the *Timber and Stone Act to the reserved lands*, and by the act of August 20, 1912, *supra*, it has withdrawn *from entry or the initiation of any right whatever* under *any of the public land laws* of the United States the lands which might revert to the United States by reason of this suit.

"This, then, being the situation resulting from conditions now existing, incident, it may

be, to the prolonged disregard of the covenants by the railroad company, *the lands invite now more to speculation than to settlement*, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from *any disposition* of them whatever or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, *until Congress* shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances *and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.*

"If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, *for a modification of so much* of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

"Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion."

It will be seen, therefore, that the opinion of the Court contemplates as well a secondary and temporary injunction as a general and permanent injunction. The general and permanent injunction is against future violations of the covenants as we now

know those covenants to be, in their scope and effect, as understood by the court. The secondary and temporary injunction it is, and that only, which has reference to the timber. Its obvious purpose is to maintain the *status quo*, so far as these lands and the timber upon them are concerned, for a limited period, until some adjustment, remediable of the anomaly that valuable timber lands should be salable at \$2.50 an acre, can be accomplished. Whatever adjustment may be made, it must be consistent with the vested rights of the railroad company. No legislation by Congress providing for the disposition of these lands, and that by their owner, the railroad company, is within the mind of the court, except such as is consistent with the vested rights of the railroad company—such as shall “secure to the defendants all the value the granting acts conferred upon the railroads.” It is not contemplated, it could not have been, that Congress should provide for a disposition of those lands by Congress itself, or by anybody else who did not own the lands. The effort of the government in this litigation to disestablish the ownership of the railroad company, to enforce a forfeiture, to revest the title in the United States, had failed. That contention had been definitely rejected. The railroad ownership had been vindicated and confirmed over and over again, but the owner of those lands, the railroad company, in essaying to make sales of the lands, was hedged in by the terms of a re-

strictive covenant, enforceable by injunction—was limited, in the disposition of these lands, to sales to actual settlers, in small parcels, at a price of \$2.50 an acre. The condition of the subject matter of the covenant—its physical and its economic condition—was inconsistent with such a covenant, the land was timber land, it was not settlement land, it was insusceptible of settlement, and its value was in excess of \$2.50 an acre. Some relief from this impracticable covenant—some feasible and equitable relaxation of its strictness in the way of an amendment and expansion of the power of disposition conferred upon the railroad company—this was the problem as the court saw it, and this is made apparent if we turn again to the opinion itself.

If these covenants were unworkable, the course of the railroad company, as the court viewed it, was not to ignore or disregard them—they were a contract and a law. The true course was to go to Congress for some amendatory legislation in the way of relief from their requirements. The judgment of the court on the grant and on these covenants, it was said, was not to be determined by suggestions *ab inconvenienti*; "It is determined," we give the language of the opinion "by the simple words of the acts of Congress, not only regarded as grants but as laws, and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance;

and, as we have pointed out, *whatever the difficulties of performance, relief could have been applied for, and, it might be, have been secured through an appeal to Congress.* Certainly, evasion of the laws or the defiance of them should not be resorted to." And taking these covenants as it found them, the court was not willing to enlarge their obligation by the wisdom that comes after the event. "Nor can their obligation," said the court, "be magnified by looking backwards, by the results achieved rather than when they were only hoped for—by conditions of which there was not even prophecy." (Opinion p. 435).

Again, the court had said, at page 428: "The character of the lands furnished no excuse; *it might have justified non-action*, but it did not justify *antagonistic action*." And more at large, and instructively, the court says, (pp. 422-3): "If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber & Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed

to have been, and difficulties beset both uses, *the remedy was obvious*. Granting the obstacles and infirmities, *they were but promptings and reasons for an appeal to Congress to relax the law*; they were neither cause nor justification for violating it."

A decree, then, in accordance with the opinion of this court would be injunctive in character, and of a two-fold aspect. It would, in the first place, enjoin the railroad company, generally and permanently, from future violations of these restrictive covenants. It would, in the second place, and as a suspensive measure, hold the lands *in statu quo*, for a limited period, until some relief from the strictness of disposition required by covenants, when seen to be inapposite to the subject matter, should be afforded by Congress. This secondary and suspensive injunction puts the sales of the land, although made in full conformity with the provisos, and as well the use of the timber by the company, in the same category. Notwithstanding that the railroad company might seek to dispose of 160 acres of this land, during the period of the suspensive injunction, to an actual settler, at \$2.50 an acre—pursuing literally the terms of the proviso—it is enjoined *ad interim* from doing so; and it is likewise enjoined, during the interim, from using the timber. The company's clear right to sell these lands, if it so elects, in conformity with the provisos, was a thing conceded of everybody. But

that clear right is put in abeyance by the temporary injunction; and similarly, the equally clear right of the owner of the land to the timber growing upon it, is put in abeyance for the same period and in the same way. No question has been made in this case, whether in printed briefs or in oral discussion at bar, as to the right of an owner by absolute grant to the use of the timber on his land. No such question was decided in the opinion of the court; no such question was stated or considered or discussed in that opinion. What the lower court was directed to do, was to enter an injunctive decree, restraining the railroad company from future violations of the covenants, as those covenants had been construed by the Supreme Court, and, further, by secondary and temporary injunction, to preserve the *status quo* in respect to the lands and the timber until Congress could interpose with some relief by amendatory legislation, consistent with the vested rights of the owner of the grant.

The District Court, it is to be said with great deference, was not content to pursue the mandate of the Supreme Court. Its decree was in excess of that mandate. It was what this court has termed an "intermeddling" with matters outside the scope of the mandate. It proceeded to determine that the railroad company had no right to use the timber upon its own lands while they were still unsold and in its possession and occupancy; it determined that the railroad company could not even make a clear-

ing in anticipation of a sale to some settler, or dig out a ton of coal; and it adjudged that the owner of the land had no right in the timber or the coal except to pass it, as part of the realty, when it sold the land to a settler at \$2.50 an acre. Two decrees were presented to the District Court—the one, by the government, imposing these new and added features upon the mandate of this court, and this proposed decree, with an omission not material here, was adopted by the District Court; the other, by these appellants, pursuing the very terms of the mandate. These decrees are set forth in the transcript of the record, and are printed as appendices to this brief.

We should now look at these decrees. The first paragraph is the same in both decrees. It provides that the original decree of the District Court, being the decree of forfeiture, “so far as it affects the defendants,” naming the appellants, “be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the ‘cross-complainants,’ and the ‘interveners’.” The second paragraph of the decree proposed by these appellants, expresses the general injunction, ordered by the Supreme Court, against future violations by the railroad company of the covenants. It is in these words: “that the said defendants and their respective officers and agents be, and each is hereby enjoined, *from selling the lands,*

or any part thereof, granted either by the act of Congress, approved July 25, 1866, as amended by the act of Congress of April 10, 1869, or by the act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, *to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two and 50/100 dollars (\$2.50) per acre.*"

The second paragraph of the decree, as signed by the District Judge, so far forth as its first clause, is—barring the fact that the words "on the land sold to him" have been inserted therein after the words "actual settler"—the same, word for word, as the paragraph of our proposed decree which has just been quoted. But the government added, and the District Court adopted, a second and further clause, touching the timber on the granted lands—likewise any mineral found therein—and this, as part, not of any temporary injunction, but of the general and permanent injunction,—enjoining the owner of the land from any disposition of the timber, and, as well, of any mineral deposits therein, except as that timber or those deposits went along with the land when it was sold within the limitations of the covenants, as indicated in the first clause. We quote this second, interpolated clause: "and from selling any of the timber on said lands, or any mineral or other deposits therein, *except as a part of and in conjunction with the*

lands on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits." This decree, it will be seen, imports bodily into the general injunction, a provision more or less reflective of the temporary restraint which the mandate imposes in aid of the maintenance of the *status quo* pending Congressional interposition. It is a gratuitous enlargement and exceeding of the terms of the mandate.

Paragraph 3 of our proposed decree, pursues in terms the mandate of the Supreme Court, touching the temporary injunction. We quote paragraph 3:

"That the said defendants and their respective officers and agents be, and each is hereby, enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the de-

defendants may apply to this court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

This paragraph of our proposed decree will bear comparison, word for word, with the language of the opinion of the Supreme Court.

Paragraph 3 of the decree as signed by the District Court, like our paragraph 3, is addressed to the temporary injunction. We understand it to go to the same thing as our proposed paragraph 3, and we note these differences: that the decree as signed takes in, as well mineral or other deposits in the lands, as timber thereon—and includes, also, moneys which have arisen, or may hereafter arise from sales of the lands or of the timber, through condemnation proceedings or otherwise, when impounded, or which may hereafter be impounded, *in custodia legis* to await the final decision of the Supreme Court. No reference to such moneys was made in our proposed decree for the reason that such impounded moneys were covered by appropriate orders in the particular litigation.

Paragraph 4 of the decree as signed is a mere continuation of the subject matter of paragraph 3, and deals with the right of defendants to apply for a modification of the injunction in the event that Congress should fail to act.

Paragraph 5 of the decree as signed includes, as part of the lands covered by the decree, such lands as have reverted or may hereafter revert to the defendants—looking more to such lands as may be embraced by executory contracts of sale on which the purchaser has suffered or may suffer default.

And paragraph 6 makes the decree to be without prejudice to any rights of the government under the joint resolution of Congress, of April 30, 1908, being the resolution authorizing the Attorney-General to proceed against the granted lands; or under the Act of Congress of August 20, 1912, being the statute authorizing the compromise of suits against purchasers from the railroad company. This need not detain us.

The seventh paragraph of the decree as signed awards costs against the appellants and in favor of the complainant to the amount of \$6,249.02; and we shall consider these costs later.

So far, then, as the timber and the minerals are concerned, the difference between the two decrees—between the one as proposed by us and the one signed—will be found in the new and added features in excess of the language of the mandate, imported by the decree into the second clause of the second paragraph—by which the defendants are enjoined not only from selling the lands, not only from future violations of the covenants, but also—and for convenience we quote again:

"from selling any of the timber on said lands, or any mineral or other deposits therein *except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found*; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, *except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.*"

Mr. Justice Lurton of the Supreme Court of the United States, was a member of the Circuit Court of Appeals which decided the case of *Bissell v. Goshen*, 72 Fed. 545. Judge Lurton, himself, wrote the opinion in that case, and the court, speaking through him, said (at p. 548):

"Whatever was before it (speaking of the Appellate Court) by virtue of that appeal, and was disposed of, has been finally done, and must be regarded as settled. The Circuit Court is bound by such decree *as the law of the case*, and must carry it into execution *according to the mandate*. The decree of this court upon any matter within its jurisdiction *can neither be modified, reversed, enlarged, nor suspended* by the Circuit Court nor can any other or less or greater relief be accorded *than that prescribed by its decree and mandate*.

Judge Lurton goes on to quote "the very pertinent summary of the doctrine by Justice Gray" in

the case of *Sanford Fork & Tool Company, Petitioner*, 160 U. S. p. 247, as follows:

"When a case has once been decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree *as the law of the case*, and must carry it into execution, *according* to the mandate. That court cannot vary it, or examine it for any other purpose *than execution*, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. U. S.*, 12 Pet. 488, 492; *Railway Co. v. Anderson*, 149 U. S. 237, 13 Sup. Ct. 843. If the Circuit Court mistakes or misconstrues the decrees of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount), or by writ of mandamus to execute the mandate of this court."

And further, at page 552, Judge Lurton says:

"It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that *it is the clear duty* of the lower court to give effect to the decree *without modification or enlargement, in the very terms of the decree here rendered.*"

No question of the right of the grantee of these lands, by an absolute grant qualified only by the provisos, to use the timber upon its granted land, or to take the coal from it or the iron that might be found below the surface, was, as we have already ventured to insist, involved or raised or argued or considered or decided. That issue was not before the court, and it is not determinable as an academic thesis, or otherwise than in some concrete case properly calling for its determination. (*Windsor v. McVeigh*, 93 U. S., 282-3). Nevertheless, gratuitously, and in excess of the mandate of the Supreme Court, the decree, as proposed by the government and adopted by the District Court, assumes or attempts to foreclose these appellants in the premises. If there is anything in the opinion of the Supreme Court, bearing at all on the question, it is to be found in the direction for a temporary injunction, where our right to make sales of these lands to settlers in statutory quantities and at statutory prices, and our right to make use of the timber, are dealt with concurrently, and are suspended alike. Both rights are associated in immediate juxtaposition, and both rights are suspended pending the interval of contemplated Congressional action, and both rights are assumed to be open to revival in the event of inaction by Congress.

It is true that the Supreme Court refused to forfeit this grant. It is true that the Supreme Court retained the title to these lands where the grant

had put it—in the railroad company—but the thought seems to be, that the failure of the government to achieve a forfeiture may be repaired by the action of Congress, and that, in some mysterious way, an appellate jurisdiction may be exercised by the legislature to review the judgment of the Supreme Court and to declare a forfeiture where the court had decided there could be no forfeiture. In other words, it is the idea, as put forth by complainant in the argument at the bar of the District Court, and sought to be realized in the decree as signed, that Congress, by legislation, may revest itself with the title which it had granted to the railroad company, and that, after all, the railroad company has a mere expectancy in a fund measured by \$2.50 an acre in the total acreage concerned, subject, again, to deduction by reason of any excess over \$2.50 an acre, which the railroad company may have received for some of these lands, and quite regardless of the administration expenses, including taxes upon a full, assessed value of \$11 an acre, incurred by the railroad company in handling the grant, and regardless as well of the uncompensated services rendered and to be rendered by the railroad company through all the years in transporting government troops and materials, and regardless also of the fact that the railroad company kept its contract with the government, and, by the construction of this road, earned the grant and received its patents accordingly. We are no longer, it would seem,

the owners of this land by absolute grant, or at all; but by a novel species of equitable or inequitable conversion the land is now, by amendatory legislation, to be revested in the grantor, and we are to be transformed into beneficiaries of a depleted and vanishing fund.

The Grantee's Estate.

We venture to think, however, that we are the owners of this land, by right, and as of absolute grant, qualified only by these provisos and by nothing else, and that, as such owners, we are entitled to the timber upon our granted land, and entitled as well to take the coal or the iron, for example, that we may find below the surface.

This grant was not a gift; it passed to the railroad company upon full and ample consideration. "The adventurers, who obtained the charter and who accepted it," to use the language of this court, in *Platt v. U. P. R. R. Co.*, 99 U. S., 48, "undertook to construct and maintain the public work. Their undertaking is the consideration of the grant, and without legislative consent, they cannot throw off the obligation they have assumed". Nor, we will add, can the grantor, without consent of the railroad company, repudiate the grant which it made.

The granting act in question here, includes special considerations and onerous obligations as against the railroad company. It requires the grantee to transport the mails and to transmit the dispatches

of the government, preferentially in point of service, and at reasonable rates, not to exceed those paid by private parties; and it obligates the grantee, for all time, to the transportation, free of charge, of the troops and property of the United States. The government holds to the railroad company "a very important relation, namely, that of contract". (United States v. U. P. R. R. Co., 98 U. S., 569, 613). The grantees "cannot throw off the obligation they have assumed". (Platt v. U. P. R. R. Co., 99 U. S., 48).

The language of this court, in the recent case of *Burke v. Southern Pacific R. R. Co.*, 234 U. S., at pages 679-680, is wholesome reading at this point:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company *was merely a gift* from the United States, and should be construed and applied accordingly. *The granting act not only does not support the contention but refutes it.* The act did not follow the building of the road but preceded it. Instead of giving a *gratuitous* reward for something *already* done, the act made a *proposal* to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, *patents* would be issued to the company *confirming in it the right and title to the public lands* falling within the descriptive terms of the grant. The purpose was to *bring about the construction of the road, with the resulting advantages to the gov-*

ernment and the public, and to that end, provision was made for compensating the company if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it into operation, the company performed its part of the contract, it became entitled to the performance by the government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the government, but the grant should not be treated as a mere gift."

This very act of 1866 was before the Court in *Bybee against Oregon & California Railroad Company*, 139 U. S. 663, 674. The court had no difficulty at that time in perceiving that this grant was like any other railroad land grant; that it was a grant of real estate, not a contingent assignment of personalty by way of an expectancy in some fund, and that it was a grant *in praesenti*. The court said:

"The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the

West, which have been considered by this court as taking effect *in praesenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with the Secretary of the Interior. *The act then operates as a grant of all odd numbered sections within the limits, except so far as they may have been in the meantime, 'granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of.'* ”

And what this Court decided in the case at bar, and its decision is now “the law of the case” (*Bissell v. Goshen*, 72 Fed. 545; *Sanford Fork & Tool Company, Petitioner*, 160 U. S. 247; *Roberts v. Cooper*, 20 How. 467), was this:

At pages 434-5 of the opinion in the case at bar, it is said:

“*There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.'* And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say ‘restrictions imposed’ to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a

right to sell on foreclosure divested of the obligations of the provisos."

And again, at page 422: "The language of the grants and of the limitations upon them is general. *We cannot attach exceptions to it.* The evil of an attempt is manifest. The grants must be taken *as they were given.* Assent to them was required and made, and we cannot import a *different measure* of the requirement and the assent *than the language of the act expresses.* It is to be remembered, the acts are laws as well as grants, and must be given the exactness of laws."

Again, at page 436: "We can only enforce the provisos *as written*, not relieve from them."

At page 432, recalling now the language just quoted, that "there was a complete and absolute grant to the railroad company, with power to sell, *limited only as prescribed,*"—we quote from what the court says of these prescribed limitations or provisos: "Their language is not directive; it is restrictive only. *With this exception the grant is unqualified.*"

The provisos, therefore, and such is now the law of this case, and of this second appeal (Roberts v. Cooper, 20 How., 467), must be taken as they are written; they are not directive, they are restrictive only; the statute must be administered with the exactness of a law; *the grant is unqualified*, except as limited by the terms of the provisos. The

limitations there found extend only to a restraint upon the alienation of the land by the grantee; they do not affect the use and enjoyment of the estate, held in "complete, absolute and unqualified grant." It cannot be questioned, we venture to think, that the grantee, would be within its rights in making leases of the land, and applying the rents upon the construction account. Nor, we submit, can it be questioned that the grantee would be authorized to take stone from the land and use it to build a railroad bridge or a station house, or for the matter of that, to turn the stone into money and place the avails against construction debt. Nor do we think it could be questioned that the grantee could take iron from the granted land for use upon its railroad fixtures or structures, or could take coal from the land—if such minerals were found there—to burn in the furnaces of its locomotives or of its machine shops. If the grantee should farm a patch of arable area, and turn the farm products into money and use that money to help pay coupon interest on the bonded debt, it would be within its rights and within the measure of its estate—for that estate is "a complete and absolute grant to the railroad company with power to sell, limited only as prescribed." If all this be true, there is no reason apparent to us upon the face and terms of the grant why the right of the grantee in like manner to make use of the timber upon the land, should be differentiated or disparaged.

It would be passing strange if the government should now maintain that the company has no right to the timber upon these lands because and although, for many years before coal was used as fuel, it burned this timber in its engines without question; and the right to use that timber, whether to burn it as fuel, or to use it in the upkeep and maintenance of the railroad, is in the forefront of the act of Congress itself, for that act granted the lands "to secure safe and speedy transportation of mails, troops, munitions of war and public stores over the line of said railroad." There could be no such transportation begun or kept up without a railroad, a railroad constructed not only but also maintained, and without fuel for motive power. Would the use of that timber to help pay the construction debt be in contravention of the railroad policy of the act? Would the removal of that timber go in defeat of the settlement policy of the act? Would it not be primarily and directly in aid of such policy?—For it is obvious enough that without a clearing most of the land is unfit for settlement.

Ferens ligna in silva—but we beg to quote the apt language from *Reeves on Real Property*, Section 423, where, in speaking of the grantee of the fee simple estate, the author says:

"Subject to any restrictions under which he may have taken it, and subject also to the mandate of the maxim *sic utere tuo ut alienum non laedas*, its owner when in possession may use

it for any purpose and in any manner that he may choose; he may cut timber, open and work mines, cultivate the soil even to exhaustion, build or pull down houses, commit waste, or injure or destroy any part of it as he may please. Not only does he have the right to sell or otherwise dispose of it as a whole, but he may grant or convey out of it any inferior interests, such as estates for years, for life or in tail."

Schulenberg against Harriman, 21 Wall., 44, is a leading and classical case in this court, and is very much to the point here. It was a railroad land grant case, as the case at bar is; it was a grant conditioned upon construction of the railroad, like the case at bar; it was a timber case, as in part the case at bar is.

The grant in the Schulenberg case was made, not in the first instance to the railroad company, but directly to the State of Wisconsin. The fee simple title of the state was qualified by a restraint on the grantee's power to alienate. "The State", to quote the language of this court, (21 Wall., at page 59) "by the terms of the grants from Congress, possessed *no authority to dispose* of the lands beyond one hundred and twenty sections, *except* as the road, in aid of which the grants were made, was constructed." Conveyances were to be made by the state of the granted lands, from time to time, as sections of the road should be constructed, no constructed section

to be less than twenty consecutive miles. In the event that the road should not be completed within ten years, "no further sales shall be made, and the lands *unsold* shall *revert* to the United States". (21 Wall., pp. 59, 60) Said this court:

"The power of disposal, and the provision for the lands reverting, both imply what the first section in terms declares, that a grant is made, that is, *that the title is transferred to the State*. It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located;—when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land." (p. 60)

It was further held that the rule of the common law, requiring the possibility of present identification of property to the validity of its transfer, and treating a grant of lands to be afterwards designated, not as an actual conveyance, but as a mere contract to convey, had no application to the legislative grant in question. And this, for the reason so often repeated since—"A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires". (p. 62)

The provision in the granting act "that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void, if a condition subsequent be not performed." (p. 62)

Touching the restraint upon the power of the state to alienate the granted lands, this court said:

"The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition *be not enforced the power to sell continues as before its breach, limited only by the objects of the grant, and the manner of sale* prescribed in the act." (p. 63)

No action had been taken by the United States, as the opinion points out, "either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State"—this court continues—"as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections".

Schulenberg, a stranger to the State's title, not in privity with the grantee of the land, had gone upon the granted land, and cut the standing timber

into logs. While he was in the quiet and peaceable possession of those logs, the defendant, Harriman, as the agent of the state and acting upon its direction, seized the logs, some sixteen hundred thousand feet of pine saw-logs. All this happened long after the expiration of the ten years fixed by the granting act for the completion of the road—no road had ever been built.

Schulenberg brought replevin against Harriman for the unlawful seizure and detention of personal property, to-wit, the severed logs. This court upheld the seizure of the logs by the State's agent, and upon the simple ground that the logs belonged to the grantee of the land. We quote from page 64 of the opinion:

“The title to the land *remaining* in the State, the lumber cut upon the land *belonged* to the State. Whilst the timber was *standing*, it constituted a *part of the realty*; being *severed* from the soil, its character was changed; it became personalty, but its title was not affected, it continued as previously, *the property of the owner of the land*, and could be pursued wherever it was carried. *All the remedies* were open to the owner, which the law affords in other cases of the wrongful removal or conversion of personal property”.

If the severed timber, in *Schulenberg against Harriman, supra*, belonged to the state, if the state could pursue the physical logs, as so much personal

property, and re-capture them in replevin, or if it could avail itself of the remedy in trover, and recover and appropriate their value; and all this years after the time had expired for the construction of the railroad, and when no railroad had been built or begun—it must be clearer yet that, in the case at bar, where there was no forfeiture, no ground for forfeiture, no room for forfeiture, and where the grant was earned and the patents were issued for a constructed railroad, the severed timber belongs to the grantee by every right and in full title, and the minerals as well.

Schulenberg against Harriman was decided by this court in October, 1874. Nearly twenty-five years after, on December 12, 1898, the case of *United States against Loughrey*, 172 U. S., 206, was decided by this court. Like the *Schulenberg* case, it was a timber case, under a railroad land grant, a case of severed timber. The action was not in replevin, for the physical logs, as in the *Schulenberg* case; it was in trover, for the money value of the cut timber. Unlike *Schulenberg against Harriman*, the title litigated to the cut timber in the *Loughrey* case was not the title of the grantee of the land grant—the State of Michigan—but it was the alleged title of the grantor, namely, the United States. The land, in the first instance, had been public land, the property of the United States.

By an act of Congress of June 3, 1856, substantially identical in the granting clause with the

granting acts in the case at bar, the land in question was granted to the State of Michigan, to aid in the construction of a railroad. It was provided:

"That the lands hereby granted shall be exclusively applied in the construction of that road, for and on account of which said lands are hereby granted, and shall be disposed of only *as the work progresses*, and the same shall be applied to no other purpose whatsoever".

This restraint on the power of the state to transfer the granted lands was emphasized by the further provision "that the said lands hereby granted to the said state, shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other".

The granting act provided for a sale of the lands for the benefit of the proposed railroads, as they were constructed. And a condition subsequent was imposed, that, "if any of said roads is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States".

And of the title and estate enuring thereunder, this court said: (*United States against Loughrey*, 172 U. S., p. 209) "Under this act the State of Michigan took the fee of the lands to be thereafter identified, subject to a condition subsequent that if the roads were not completed within ten years the lands unsold should revert to the United States". The opinion of the court goes on:

"With respect to this class of estates, Professor Washburn says that 'so long as the estate in fee remains, *the owner in possession* has all the rights in respect to it, which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another—something *more than a possibility of reverter* belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the premises'. 1 Wash. Real Prop. 5th ed. 95."

This court then makes reference to the leading and ruling case of *De Peyster against Michael*, 6 N. Y., 467, 506, in which Judge Ruggles, a great judge, speaking for his court, pronounced one of the most learned and interesting judgments in the New York Reports. The reference to the *De Peyster* case, by this court, is in these words:

"The right of re-entry * * * * 'is not a reversion, nor is it the possibility of reversion, *nor is it any estate in the land*; (Italicized by this court) It is a mere right or chose in action, and if enforced, the grantor would be in, by the forfeiture of a condition, and not by a reverter. * * * It is only by statute, that the assignee of the lessor can re-enter for condition broken. But the statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other *estate*. (Italicized by this court) * * * When property is held on condition, all the *attributes and incidents of absolute property* belong to it, until

the condition be broken'." (Italicized by this court)

If, now, the State of Michigan, in fulfillment of its covenant, that the lands should be held for railroad purposes only, had transferred such lands in aid of railroad construction, it would follow, obviously enough, as to the property so transferred, in the hands of the grantee, that "all the attributes and incidents of absolute property belong to it until the condition be broken". But no such situation, in respect to any grantee of the State of Michigan arose; for the reason, as found by the trial court, "that said railroad was never built, and said grant of lands was never earned by the construction of any railroad". (172 U. S., p. 208)

In 1887, some twelve years after the period of ten years, fixed by the granting act for the construction of the railroad had expired, Joseph E. Sauve cut some six hundred thousand feet of timber on the granted lands, removed eighty thousand feet of the timber so cut, and left the balance skidded upon the lands. The defendant, Loughrey, was charged as a purchaser of the cut timber from Sauve, and the United States sued him in trover to recover its value.

Under the decision in *Schulenberg against Harri-*
man, supra, if no act had been passed by Congress, forfeiting the land grant, for breach of the condition subsequent, in respect to the construction of the

railroad, at the time when Sauve cut this timber in 1887, it would seem that the title to the timber was still in the grantee, the State of Michigan, and that the United States was without estate, right, title or interest, to maintain trover for its value. It was held by this court, quoting from Mr. Justice Field in the *Schulenberg case*, as follows:

"The title to the land remaining in the State, the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property". (172 U. S., p. 211)

And the court, in the *Loughrey case*, goes on to say:

"It follows that the United States, having no title to the lands at the time of the trespass and no right to the possession of the timber, are in no position to maintain this suit". (p. 211)

But the *Loughrey case* contained a differential element. In the *Schulenberg case*, while no railroad had ever been built, yet forfeiture had not been asserted by the United States for breach of

the condition. In the Loughrey case, however, a year or more after Sauve had cut the timber, Congress passed the act of March 2, 1889, forfeiting the land grant; and it was argued for the United States that this forfeiture "operated by relation to revest in the United States title to the timber, which had been cut during the winter of 1887 and 1888, and prior to the act of forfeiture". This court replied:

"The position of the plaintiffs must necessarily be that this act of forfeiture not only revested in the United States the title to the lands as of a date prior to the cutting of the timber in question, but also revested them with the property in the timber which had been cut while the lands belonged to the State of Michigan. Had this act of forfeiture not been passed, there could be no question that, under the case of *Schulenberg v. Harriman*, 21 Wall. 44, this timber would have belonged to the State of Michigan, and no action therefor could have been brought by the United States."

The court goes on:

"But conceding all that is contended for the plaintiffs with respect to the revestiture of the title to the lands by this act, it does not follow that the title to the timber which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg v. Harriman*, the title to the timber remained in the State after it had been severed. But it re-

mained in the State *as a separate and independent piece of property*, and if the State *had elected to sell it*, a good title would have thereby passed to the purchaser, notwithstanding the subsequent act of forfeiture”.

The court now proceeds to use language of interest here, as bearing upon a somewhat transparent fallacy, argued by the government, when the case here was at the bar of the court below. It was said that inasmuch as there was a restraint upon our power to alienate lands, except to specified persons, we had no right to make use of the timber, or of the coal, or of the iron, or of other product or deposit of the soil, because it was all a part of the land. Said the court, in speaking of the cut timber, in the *Loughrey* case:

“It did not remain the property of the State as a *part of the lands*, but as a *distinct piece of property*, although the State took its title thereto through and in consequence of its title to the lands. *From the moment it was cut, the State was at liberty to deal with it as with any other piece of personal property*”. (172 U. S., pp. 217-18)

And finally, this court concludes:

“Counsel are mistaken in supposing that the plaintiffs (United States) had an immediate right to the possession of this timber. They had no right to the possession of the land until Congress passed the act of March 2, 1889, for-

feiting the grant. Up to that time the title was in the State, and until then the United States had no more right to enter and take possession *than they would have had to take possession of the property of a private individual*". (172 U. S., p. 219)

There was a dissenting opinion in the *Loughrey* case. It went upon the view, that, under the terms of the granting act, "the State of Michigan was not the beneficial owner of the land, from which the timber in question was severed". (p. 231)

The state of Michigan was regarded, not as the grantee of a "complete, absolute and unqualified" title, but as a mere trustee—the trustee of an express trust, to hold the granted lands, in the first instance, for the benefit of the owners of a line of railroad, if such railroad should be constructed; and secondarily, for the benefit of the United States, in the event that a forfeiture should be declared for breach of the condition subsequent. (p. 221)

The forfeiture having been declared in 1889, no execution of the trust having been effected, in favor of the primary *cestui*, namely, the owner of the contemplated line of railroad, no such railroad having been brought into existence, the trust having, therefore, ceased,—it was argued that the title by forfeiture, revested by statute of 1889, in the United States, operated by relation to put the title, as of the date of the trespass, in the United States,

to the timber which had been severed by Sauve in 1887. (p. 230)

It was insisted that the state, whose status, as a mere trustee, had been extinguished by the forfeiture, "did not stand in the attitude of a grantee of land, upon a condition subsequent, to whom an absolute conveyance had been made for its sole use and benefit. Authorities, therefore, to the point that in the case of such a conveyance, the only right of the grantor is to receive back, upon re-entry, the granted land, in the condition in which it might then exist, have no pertinency in a case like the present, where the grant was to the State, not as absolute owner, but as a mere trustee." (p. 230)

But, we inquire, suppose the State had executed the trust, by conveyance, to the primary beneficiary, the railroad company; and suppose, as in the case at bar, the railroad company had earned the grant by construction of the road, what would have been the view of the dissenting judges, if the United States had challenged the right of the railroad company, in an action against Sauve, or the purchaser from Sauve, to recover the value of the severed timber?

The Loughrey case was followed and approved by this court, in *United States against Tennessee and Coosa Railroad Co.*, 176 U. S., 242, decided February 5, 1900.

This, again, was a railroad land grant case. The grant was made directly to the State of Alabama, and the State, pursuant to the terms of the granting

act, conveyed to the Coosa Railroad. The grant was made on June 3, 1856; some ten miles of road were constructed, only that and nothing more; and the suit was brought by the United States, under the General Forfeiture Act of September 29, 1890, against the railroad company, to forfeit the land grant.

The Government's bill set up the failure of the company to build the road, averred the execution by the railroad company in 1887, of the conveyances to one Carlisle, of some forty thousand acres of granted land, alleged that there was valuable timber on the lands, which the company and other persons were cutting and carrying away, also valuable mines which they were working; and asked for a receiver and injunction, a cancellation of the conveyances, and a forfeiture of the lands, and for general relief.

It was held by this court, that under the special terms of the granting act, the sale of one hundred and twenty sections of the grant, "in advance of the commencement of the construction of the road," was authorized; and that the title of Carlisle, to so much of the conveyed land as fell within this tract of one hundred and twenty sections, must be sustained.

It was further held that the conveyance by the company of so much of the grant, as was coterminous with the ten miles of constructed line, must likewise be sustained, inasmuch as the act of Congress forfeited those lands only, which were not

opposite the completed road on September 29, 1890.

Schulenberg against Harriman was considered and fully approved; also the decision of this court, in *Railroad Company against Courtright*, 21 Wall., 310. And the *Loughrey* case is cited as an application of the same principles. Speaking of these prior decisions, the court, by Mr. Justice McKenna, said: (p. 253)

"The title passed to the State, it was decided, continued in the State with all its *attributes and power, except as expressly limited*, until it should be resumed by the grantor by appropriate proceedings for breach of conditions. Hence the logs in that case, though *cut upon land to aid a railroad which had not been constructed*, and after the time designated for its construction, and after which all unsold lands should revert to the State (Government) was held to belong to the State (the grantee). And in the *Courtright* case upon the same principles it was held that lands sold by the railroad without constructing the road carried title to the vendee. There was a reassertion and an application of the same principles in *United States v. Loughrey*, 172 U. S. 206.

It follows that by the act of June 3, 1856, the State of Alabama took the title to the lands in controversy upon conditions subsequent, and conveyed such title upon the same conditions to the Coosa Railroad; and that it continued in the railroad until determined by proceedings, legislative or judicial, for such forfeiture, and

until such determination all the rights and powers conferred by the act continued and could be exercised”.

The *Loughrey case* is again cited as authority by this court, in *United States against Anderson*, 194 U. S., 394, decided May 16, 1904. The opinion is by Mr. Justice White, who wrote the dissenting opinion in the *Loughrey case*.

The *Anderson case* is, again, the case of a railroad land grant. Congress had made a grant to the State of Alabama in aid of railroad construction. The State accepted the grant, and, in turn, granted the lands to the Northeast and Southwestern Railroad, an Alabama company, to be used and applied by said company “upon the terms and conditions in said act of Congress contained”. The act of Congress contained an indemnity provision, as follows: “But in case it shall appear that the United States have—when the lines or routes of said roads are definitely fixed—sold any sections or any parts thereof, granted as aforesaid; or that the right of pre-emption has attached to the same:—then it shall be lawful for any *agent or agents*, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior”, a corresponding quantity of indemnity land from the adjacent alternate sections, within the maximum limit of fifteen miles. An order of withdrawal was made by the Land Department of such lands as were assumed to be included within the

place and indemnity limits of the grant, and among these withdrawn lands was the land in suit. The railroad was constructed, and the grant was earned.

In December 1887, and pursuant to the act of Congress, an agent was appointed by the Governor of Alabama to select indemnity lands, in lieu of lands within the primary limits of the grant, which had been lost to the railroad company by sale or pre-emption. The agent made the selections and tendered the legal fees and charges, but the local land officers rejected the selections, and an appeal was taken to the Commissioner of the General Land Office. "In April 1896, (some eight or nine years after the selections had been made) the appeal was decided in favor of the selections, which were approved, and the title consequently passed from the United States to the State of Alabama, in trust for its grantees, under the act of Congress". By mesne conveyance the railroad title passed to the plaintiffs in the action below, namely, Anderson and others; and it was between these plaintiffs and the United States that the action was litigated.

It was not a timber case this time, but a mineral case, and it arose in this way, as stated by Mr. Justice White:

"During the period, however, which intervened between the selections of land made by the agent of the State of Alabama and the approval of the selections by the Secretary of the Interior, certain persons went upon the

lands selected and *removed* therefrom valuable *iron ore and lime rock*. After the approval of the selections the United States brought a suit to recover from the persons who had thus trespassed upon the lands, the *value of the product* by them removed. The owners of the land, in pursuance of the selections, (Anderson and others) asserted a claim to the *benefit* of the *recovery* which might be made, but assented to a compromise *made by the United States* with the trespassers, by which *fifteen thousand dollars was paid to the United States, as the value of the material taken from the land*. The owners of the land at the time of the compromise protested that they alone were entitled to receive the sum paid to the United States, and reserved their right to recover the same from the United States".

As a sequel, Anderson and the other owners, sued the United States for the fifteen thousand dollars, in the Court of Claims. Judgment went against the United States, and the case was brought here by the government on appeal from the judgment.

"The sole contention of the Government", says Mr. Justice White, "is that the plaintiffs, *after* application for selections and *before* approval of the selections, had no such title to the land as would have justified a recovery from the trespassers, and, *a fortiori*, therefore, had no such title as would warrant their recovering from the United States the sum of money which it collected from the trespassers

for the elements removed from the land during the period between the date of the application for selections and the approval of the same by the Secretary of the Interior”.

The Government, it is pointed out, conceded the act of Congress to be a grant *in praesenti* of the land within the primary limits, but denied that any right to the indemnity lands vested in the grantee “until aproval of the selections by the proper officers of the government; and hence the legal title was in the United States, as to such lands, *pending action on the application for selections*, and, therefore, *at the time of the trespass*, the United States was alone authorized to recover for the depredations committed”.

Mr. Justice White readily yields to the general doctrine of indemnity selection, that the legal title to the indemnity land remains in the United States until divested by the approval of the selections, but he does not conceive that the doctrine rules the case before him. “On this record,” he says, “the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain, as against *its grantees*, the proceeds recovered by it, as the result of a trespass upon land, *after an application for the selection of such land and pending action thereon by the proper officers of the Government*. Under these circumstances, the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal

title is held to relate back to the initiatory step for the acquisition of the land."

The case, to his mind, was "one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that, at the time of the application for selections, the land in question was rightfully claimed by the applicant."

"Nor is the assertion well founded", he says, "that this case is not a proper one for the application of the doctrine of relation because coming within the rule announced in *United States v. Loughrey*, 172 U. S. 206. At the time of the trespass complained of in that case, the United States had taken no step to assert its reversionary rights in and to the land trespassed upon, the legal title to which was in the State of Michigan at the time the trespass was committed. Here as we have seen the grantee had exercised his right to apply for selections within the indemnity limits, and had in legal form requested the approval of the same by the Government. Everything, therefore, which the grantee was required by law to do, to obtain the legal title had been performed. These facts bring this case within the principle decided in *Heath v. Ross*, 12 Johns, 140, and *Musser v. McRae*, 44 Minnesota, 343, referred to in the opinion of the court in the *Loughrey* case, (p. 218) as not being inconsistent with the principle there applied. *Heath v. Ross* was an action of trover for timber cut between the application for and date of a patent from the

State, and its ensealing and delivery by the Secretary of State. The title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer, for the value of the timber cut and carried away in the meantime. *Musser v. McRae* was an action brought to recover the value of timber cut by trespassers from indemnity lands selected by the agent of certain railroad companies, intermediate the application for selection and the patenting of the lands. To permit a recovery, it was held that the title evidenced by the patent related back at least to the date of the application for selection".

"Concluding, as we do", Mr. Justice White goes on, "*that the money in question belongs to the appellee as the successor in interest of the party for whose benefit the application for selections was made*, it results that the judgment of the Court of Claims must be affirmed."

Howe v. Lowell, decided by the Supreme Court of Massachusetts, August 30, 1898, (171 Mass., 576) is an interesting and pertinent case. Howe had granted certain land to the City of Lowell, but "on the express condition that the grantee shall, within three years from the date hereof, lay out and construct, and thereafter forever maintain, a public highway over the within described premises at least fifty feet in width, having the northerly line of the within described premises as the northerly line of such highway, and also on the express con-

dition that that part of said premises not taken or used for said highway shall be improved, dedicated, and forever used by the said grantee as and for a common, park, or boulevard, and for no other purpose;" and it was added for good measure that in the event of a breach of the conditions, the deed should be absolutely null and void, and the premises should revert to and revest in the grantor, his heirs and assigns, as fully, completely and effectually, as if these presents had not been executed."

It may be glanced at, by the way, that the grantor intended to keep to himself a certain product of the granted premises, not timber or minerals—it was ice, in this case,—and he took care to say so: "The right to take ice on the Merrimack River where it flows over the premises herein conveyed is hereby expressly reserved to the grantors, their heirs and assigns, or other person or persons who now have that right".

The grantee built the highway, also a boulevard—so far, so good, but it went farther. In 1891, 1892 and 1895, the City, for the purpose of obtaining a supply of water by means of artesian wells, drove a number of iron pipes, two and a half inches in diameter, into the granted land. The experiments of 1891 and 1892 were not productive of water, and one or two of these pipes were left in the ground. Indeed, in 1892, the ground was dug up and left in a rough condition, one or two pipes were left projecting above the surface, and in a

number of cases where the pipes were removed, the holes were not filled in, so that it was hardly safe to walk over it; some trees originally on the land at the time of the conveyance were destroyed, and a sluiceway was dug to carry off waste water, and refuse coal was left upon the ground. In 1895, the grantee had better luck with its borings, and a permanent source of water supply was developed on the land. One hundred and forty pipes in all were driven into the ground. So much, as to the explorations for water, and so much as to the pipes driven into the land.

On one of the granted lots, for there were several, the lot known as lot A, the city put up an engine house, and connected the engine therein by a large pipe with the other pipes, 140 in number. This large pipe carried the water by gravity into the conduit of the city. The opinion of the court deals first and separately with the sunken, sub-surface pipes; and next with the upstanding engine house and plant on lot A. This engine house or pumping station—a pumping station for supplying the inhabitants of the city of Lowell with water—the court had no difficulty in resolving as a breach of the condition on which the land had been granted, and we dismiss the pumping plant from further consideration. Now, for the pipes. Said the court:

“As the highway has been constructed, the question is whether there has been a breach of

the conditions that the parts of the premises not taken for a highway 'shall be improved, dedicated, and forever used by the grantee as and for a common, park, or boulevard, and for no other purpose.' The title in fee to all the parcels vested in the city of Lowell, subject to conditions subsequent by the breach of which its title would be divested, and would revest in the grantors and their heirs".

The court then refers to a product of the granted land—in this case, the subterranean water—in language that would be just as apposite, if it had been spoken of timber, or of coal, or of iron.

"The subterranean waters in the parcels", said the court, "were a part of the parcels, and the grantors in the deeds have not reserved to themselves the property in these waters, while the deeds are in force".

Reference is made to the *Wellington case*, 16 Pick., 87, 99, concerned with a grant of certain land to the town of Cambridge, whereby "the same is hereby granted to the town of Cambridge, to be used as a training field, to lie undivided, and to remain for that use forever, provided, nevertheless, that if the said town should dispose of, grant, or appropriate the same, or any part thereof, at any time hereafter, to or for any other use than that aforementioned, then, and in such case, the whole of the premises hereby granted to the said town shall revert to the proprietors granting the same".

The language of the Supreme Court of Massachusetts, in deciding the *Wellington case*, is now quoted:

"By the grant the town became owners of the soil with full power, as such owners, *to make any use of the property which owners of land can make*, subject only to the restraint and limitation expressed in the condition. All such limitations and restrictions, especially those which go to create a forfeiture, are to be construed strictly, and not to be extended beyond the plain terms of the clauses in which they are expressed, and the obvious purposes for which they are introduced".

But the trial court, in *Howe against Lowell*, had found "that the use of the land for the *purpose of driving wells and drawing water therefrom*, and the erection of engines and boiler houses, were uses and purposes not in the minds of the grantors or even of the grantee, when the deeds were given". Of this, the Supreme Court said:

"As the grantee took the lands in fee, it is entitled to make any use of the lands not in violation of the conditions in the deeds, whether the *parties thought of it or not*. It is not a new use to lay water pipes in lands taken and used as a highway. Water pipes are sometimes laid in and through commons and lands taken or purchased for a public park, but we are aware of no case in which it has been held that it requires a new taking to do this, or that such a laying of pipes is not within the terms of the

deeds granting lands for these purposes. On the theory of the demandants, the *subterranean waters* of the lands cannot be used by the city without forfeiting the lands, and cannot be used by themselves *because they have not reserved the waters or excepted them from the grant.*"

It was accordingly held "that the construction and maintenance of the system of pipes did not constitute a breach of the conditions in the deeds.

Upon this question of timber and the rights of the owner of a fee therein or, more largely speaking, upon the question of waste, to use the old common law term—the case of *Landers v. Landers*, 151 Ky., at pages 215-217, gives an instructive summary of the law, and with special reference, in that case, to a defeasible fee. We think it may be convenient at this place to make the quotation:

"The next question to be determined is whether or not plaintiffs may recover damages from the estate of Bryant Landers for the timber cut and removed by him from the 170 acres of land devised to him by John Landers, and in which he owned only a defeasible fee. Our statute on the subject does not cover a defeasible fee, so recourse must be had to the common law. In 2 Blackstone, page 282, we find the following:

'Let us next see who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life

only, we find that the rule was general for all vassals or feudatories: "*si vassalus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*" But in our ancient common law the rule was by no means large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons: guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years; and the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and, if he did not, it was his own default. But, in favor of the owners or the inheritance, the statutes of Marlbridge, 52 Hen. III, c. 23, and of Gloucester, 6 Edw. I, c. 5, provided that the writ of waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. So that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment for waste, *absque impetitione vasti*; that is, with a

provision or protection that no man shall *impetere*, or sue him for waste, committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action of waste lie for the debtor against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account; but it seems reasonable that it should lie for the reversioner, expectant on the determination of the debtor's own estate, or of those estates derived from the debtor.'

"The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the contingency upon which it is limited occurs, as if he were tenant in fee simple. *Walsingham's case*, *Plowd.*,—*Chitty*."

"In *Weed v. Woods*, 71 N. H. 581, it was held that where a deed reserves to a grantor a certain portion of the premises so long as a religious association may want it, the estate retained is a qualified or determinable fee; and during its continuance the grantor and his successors in title, while they retain possession, have all the rights of tenants in fee simple.

"Mr. Washburn, in his treatise on real property, 4th edition, volume 1, page 89, section 86, in speaking of the incidents of a determinable fee, says:

'So long as the estate in fee remains the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, unless it be so limited that there is

properly a reversionary right in another—something more than a possibility or reverter belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the premises.’

“In *Gannon v. Peterson*, 55 L. R. A. 701, 193 Ill. 372, it was held that the opening of mines, and the mining of coal by the owner of a determinable fee in property of which the coal constituted the chief value, was not such waste as could be enjoined by the owners of the expectancy, who claimed under an executory devise—at least where it is not made to appear that the contingency which would determine the fee was reasonably certain to happen. In discussing the question the court said:

‘The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee simple estate; not absolute, but qualified. Upon the death of the donee, his widow has dower, although the contingency may have happened that defeats the estate, and that within the general acceptation and meaning of the term the person seized of such an estate is not chargeable with waste.’

“The only exception to this rule is that equity will sometimes restrain equitable waste. Equitable waste is defined by Mr. Justice Story to consist of ‘such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not

inconsistent with the legal rights of the party committing them.' 2 Story Eq. Jur., sec. 915. The same author further says: 'In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.' Lord Chancellor Campbell, in *Turner v. Wright*, 6 Jur. N. S., 809, 29 L. J. Ch. N. S., 598, defines equitable waste to be 'that which a prudent man would not do with his own property.'

"Even if an action for damages would lie for equitable waste, a question not decided, there is nothing in the record before us to show that Bryant Landers was guilty of such waste.

It does not appear that he was guilty of a wanton and unconscientious abuse of his rights, or that he did that which a prudent man would not do with his own property. We, therefore, conclude that the action for waste was properly dismissed."

The historical and interesting case of *Attorney General against Duke of Marlborough*, 3 Madd., 498, turned on the right of a tenant in tail to cut timber on the granted estate. Blenheim House and the Manor of Woodstock had been granted in fee tail to the great Duke—a nation's reward to the victor of Blenheim. Tenancy in tail, like the tenure of a railroad land grant, is of statutory origin. It originated, as will be recalled, in the Statute *De Donis Conditionalibus*, designed to restrain the alienation of conditional fees—limited, for example, to the ten-

ant and heirs of his body—alienations which tenants had been practicing freely to the alleged prejudice of their issue and of the lord in reversion. The statute restrained the power of alienation except, as by amendment was afterwards permitted, to the extent of certain leases; it entailed the estate strictly. But like some other celebrated statutes,—the Statute of Uses, for instance the Statute *De Donis Conditionalibus* was, in time, over-reached—by the process of fine and recovery, and the tenant was enabled to bar the entail and clothe himself with a fee absolutely. It was well settled that a tenant in tail—even a tenant in tail after the possibility of issue extinct, was dispunishable for waste. But the Blenheim granting act went beyond the Statute De Donis, and industriously and in very clear terms forbade the barring of the entail.

The defendant, Duke of Marlborough, in the case now cited, was in by a fee simple title, but it was a fee tail in the strictest sense, a fee simple to which a restraint upon alienation was attached beyond circumvention. Did he have the right to cut the timber on the entailed estate and apply its proceeds to his own use?—that was the question before Sir John Leach. We quote from the opinion:

“That an ordinary tenant in tail may, at his pleasure, cut down all timber for whatever purposes planted, admits of no question, and it is hardly necessary to advert to the origin of that particular species of tenure. It grew out of

the ancient conveyances to a man, and to the heirs of his body. Under such a conveyance, it was held at common law, that until issue born, he had not the absolute property in the estate, it being limited by the grant, not to his general heir, but to the heirs of his body; but that the moment issue was born, the condition being performed, the estate became absolutely his property, and he could dispose of it in the same manner as if he had held it in fee simple. The legislature, however, thought fit to interfere, and by the Statute of Westminster, the Second (commonly called the *Statute De Donis*, 13 Edward I c. 1.) it was declared, that the Will of the Donor or Grantor should be observed, and that an estate so granted to a man and the heirs of his body, should descend to the issue, and that he should not have power to alienate the estate. In the construction of that Act of Parliament, it was held, that a tenant in tail remained with the same unqualified and absolute ownership of his estate, as he had before that statute, with the *single exception of the restraint on alienation*. In that restraint of alienation was included, alienation by lease; leases being considered, according to the construction of that statute, as partial alienations; but by subsequent statute of the 32 Hen. VIII c. 28, a tenant in tail is permitted to make certain leases mentioned in that statute. With the exception, therefore, of alienation including leases, unless according to the Statute, a tenant in tail is at this day to be considered as much

the absolute owner of the estate as a tenant in fee simple, and as such, may do what he pleases with the buildings and timber on the estate."

Sir John Leach now takes up the provision of the granting act, by which the barring of the entail was forbidden. "In the first place," he says, "it is to be observed that this is an express admission by the legislature that the estate conferred upon the issue of the Duke of Marlborough, by the previous limitations, was an estate capable of being barred by fine or recovery, or in other words, was an estate tail, to which alone the bar by fine or recovery is applicable; and this provision is, therefore, nothing more than a declaration on the part of the legislature, that the estate tail, given to the issue of the Duke of Marlborough, should, in this respect, lose one of the incidents which belong to it, by the principles of law, namely, the power of barring the entail by fine or recovery; and necessarily, therefore, leaving every tenant in tail in possession with every other legal incident, which belongs to the nature of his estate, and consequently, *leaving him as much the absolute owner of the timber and buildings on the estate, as if he were tenant in fee simple.*"

The court notices, by way of contrast, the case of tenant for life, as to which "it is to be observed that the ownership of the timber is not a legal incident to the estate of tenant for life"; and as to a tenant in tail, after possibility of issue extinct, it is said that

he is, "in effect a tenant for life, *without* impeachment of waste."

Sir John Leach finally calls attention to a statute of the 5th Anne, c. 4, not noticed in the pleadings or argument, and making a settlement of five thousand pounds a year on the Duke's posterity, "for the more honorable support of their dignities in like manner as his honors and the honor and manor of Woodstock and the House of Blenheim were already limited and settled."

"I cannot read these several acts," says Sir John Leach, "and attend to the circumstances of this property and observe the manner and purpose of building this house of Blenheim, and the special annexation of it to the honors and dignities of this family, as was particularly recited in the last act, without stating that there appears to me to be clear and necessary implication that it was the intention of the legislature that the House of Blenheim should, in all times, as a distinct subject, descend and be enjoyed with the honors and dignities of this family, and that it was not the intention of the legislature that the successive possessors of these honors and dignities, should have the rights of property over it, which, *with respect to the rest of the estate*, were legally incident to their character of tenant in tail. I think the legislature thus imposed upon every possessor of these honors and dignities the obligation to maintain the House of Blenheim for the future residence of those to whom the succession

was limited; and that this court is bound to interfere to prevent its destruction. I am clearly of opinion that the Duke of Marlborough, having no power of destruction over the house *has no power of destruction over the timber which is essential to the shelter or ornament of the house.*"

Intrinsic and Corroborative Evidence of the Granting Acts Themselves.

We have had occasion, in citing *Howe against Lowell*, 171 Mass. pp. 582-3, to quote, *inter alia*, this language:

"As the grantee took the lands in fee, it is entitled to make any use of the lands not in violation of the conditions in the deeds, *whether the parties thought of it or not.*"

Something, now, as to the granting acts in the case at bar, and as to the timber and the minerals—and whether the parties thought of these things or not.

"As a rule of construction," this court has held (*Blair against Chicago*, 201 U. S. p. 475), "a statute amended is to be understood in the same sense exactly, as if it had read from the beginning as it does amended."

The Act of July 25, 1866, is, therefore, to be read as if it had contained the settlers' clause from the beginning; the act of May 4, 1870 had the settlers' clause in it when originally passed.

Congress, when it attached to the otherwise unqualified estate of the grantee the covenant found in

the settlers' clause, and when it made the grant itself, did think of some things—of some limitations or of some limitation upon the estate, but that limitation did not include the timber upon the lands granted. There was something in the lands granted—a product or component of the soil—which Congress did think of and which Congress expressly and pointedly excepted out of the estate, and that was the mineral therein.

The original act of July 25, 1866, in Section 10 thereof, reads as follows:

“And be it further enacted, That all *mineral lands* shall be excepted from the operation of this act; but when the *same* shall contain *timber*, so much of the *timber* thereon as shall be required to construct said road *over such mineral land* is hereby granted to said companies: Provided, that the term ‘mineral lands’ *shall not include lands containing coal and iron.*”

The act of May 4, 1870, Section 1, grants

“each alternate section of the public lands, *not mineral*, excepting *coal or iron* lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof.”

It is thus seen that Congress expressly dealt with the mineral contents of the lands granted by the act of 1866, and indeed, in an express but partial way, with the timber thereon; but the Congressional exception conspicuously includes in its limitation of the grant only such timber as there shall be, not on

the granted lands, but on the excluded mineral lands, and even as to such excepted timber the company is accorded the right to use so much as shall be necessary "to construct said road over such mineral land." Again, in the act of 1870, the minerals, in distinction from the timber, are expressly excluded from the operation of the grant. And more than that, and in both acts, even in the exception of the minerals, it is provided that such exception *shall not include coal and iron*—a plain recognition of the grantee's right to the coal and to the iron existing in the granted lands; and yet, in the decree as signed by the District Court, it seems not to have been enough to exclude our right to the timber of the non-mineral, unexcepted and granted sections, but all mineral deposits, including, therefore, the coal and iron, are excluded by the terms of the decree.

The settlers' proviso, under the familiar rule of construction, amendment though it was, must be read with the rest of the grant, as if it had been there from the first beginning. It must be read consistently and harmoniously with the rest of the act; and it must be read in the light of the time and the environment in which it was passed, not by the wisdom that comes after the event; (*U. S. v. U. P. RR.*, 91 U. S., 72, 81) not with a perverted purpose to turn a settlement act into a timber and stone act. It never entered the head of the man who wrote these granting acts, or of the men who voted for them,

that the railroad company had no right in, or use for all this timber, or coal, or iron, except to sell it to settlers—as if the settlers wanted it. The grotesque incongruity of the thing is not to be imputed to the legislature. It was settlement land that was contemplated by the provisos—arable land, tillable by settlers.

The timber, cleared off and out of the way, to make place for the settler, the coal, the iron,—that went with the grant, to the owner of the land. (*United States against Losekamp*, 127 Fed. 959) The grantor itself, in 1878, as the opinion of this court notices, took its own lands, lying within the circumscription of the grant, its even numbered sections, out of the settlement laws and put them under the timber and stone act. And the Ferris Act is an object lesson; it first clears and sells the timber and then offers the land for settlement.

It is not of moment, as said in the Massachusetts case of *Howe v. Lowell*, *supra*, whether the parties thought of the timber or not. But Congress did think of the timber, and it thought of the minerals, and it dealt with the timber and with the minerals in a way to make it convincingly evident that so far as the granted lands were concerned, no limitation upon the estate of the grantee in respect to the timber, or in respect to the coal or iron, was contemplated or imposed. And now, as to the patented lands, all minerals therein found—not coal and iron only—are, by force of the patent, the property and

estate of the patentee. (Burke v. S. P. R. R., 234 U. S., 669). The case at bar is a revealing instance of that canon of construction—the rule of *expressio unius*—which this court invoked and applied in passing upon the question of a condition subsequent. For it will be remembered that the opinion of the court contrasts the expressed penalties of reverter and forfeiture, attached by Congress to failure on the part of the grantee to construct the railroad within the prescribed time, or to file its assent within the prescribed time, over against the absence of such penalties or of any penalty from the provisos in which the settlers' clause is contained.

So much for the rights of the grantee to the lands, which it contracted for, earned and paid for, and to the timber, the coal, the iron, or other mineral content.

- It appeared from the record which this court had before it on the first appeal, (Vol. 13, pp. 6836-7) that the company had been under an expense, in administering the grant from April 1, 1870 to April 30, 1911, of \$1,184,542.84; that it had paid the taxes on the granted lands to 1910 inclusive, that taxes had been levied on the lands for the year 1911, and that during the more recent years of the above period, taxes had been levied upon an assessed valuation in excess of \$2.50 per acre—ranging from \$2.96 per acre up to \$10.32 per acre—the taxes so paid and levied amounting to \$2,434,843.33 (Vol. 5, pp. 2567 et seq.); making a total administration

expense, including taxes, of \$3,619,386.17. The total cash receipts from all sources, April 1, 1870 to April 30, 1911, including sales of land (Vol. 13, pp. 6836-7) are stated to be \$5,488,020.72. This leaves the company a net revenue from past transactions up to April 30, 1911, over and above expenses paid and taxes levied, of \$1,868,634.55. The average net revenue per acre for the lands sold, aggregating some 820,000 acres (Vol. 4, p. 1578) figured up to April 30, 1911, on the basis of the above items, was \$2.27.

The grant obligated the company to carry free for the United States government its property and troops, without limit as to time. The value of this free transportation, at the regular rates and computed for the service over the company's line in Oregon between 1882 and 1911 inclusive, is \$1,894,970.09 (Vol. 13, pp. 6835-6, and computation based thereon). This amount is in excess of the receipts of the company, hereinabove mentioned by \$26,335.54. And if these figures could be carried down to date, the deficit would be largely increased, and further the average net revenue, above indicated, of \$2.27 per acre for the land sold, would be expressed by a much diminished figure.

II.

THE FERRIS ACT IS INVALID.

In the statement with which this brief opens (pp. 1-12 ante) the salient and pertinent provisions of

the Ferris Act were given succinctly. We print the act in full as an appendix to this brief.

The protection of vested property rights has been a constitutional guaranty and bulwark from the beginning.

Said Chief Justice Marshall, speaking of a legislative grant, which the legislature, by a subsequent statute sought to resume,—(*Fletcher v. Peck*, 6 *Cranch*, p. 135) :

“Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.”

The same great judge, in *Terrett v. Taylor*, 9 Cranch, p. 50, is again speaking of a legislative grant and its attempted repeal: "If the legislature," he says, "possessed the authority to make such a grant and confirmation, it is very clear to our minds, that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine, that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine could uproot the very foundations of almost all the land-titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

In *Wilkinson against Leland*, 2 Peters, 627, 657-8, Mr. Justice Storey refers to *Terrett v. Taylor*, *supra*, in language which has become one of the traditions of this court: "In *Terrett v. Taylor*, 9 Cranch 43," he says, "it was held by this court, that a grant or title to lands, once made by the legislature, to any person or corporation, is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitu-

tional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

"It seems to us," said Mr. Justice Miller, carrying on the tradition, (*Davidson v. New Orleans*, 96 U. S., 97, 102) "that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

In this fundamental matter, the opinions, prevailing and dissenting, in the Sinking Fund Cases (99 U. S., 700) are at one. In the prevailing opinion by Mr. Chief Justice Waite, it is said: (p. 718)

"The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation com-

pel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, *without the consent of the corporation*. All this is indisputable."

To the same effect is the dissenting opinion of Mr. Justice Strong: (p. 731)

"As was said by Mr. Hamilton in his celebrated communication to the Senate of Jan. 20, 1795, 'when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' 3 Hamilton's Works, 518, 519. Opinions similar to this have often found expression in judicial decisions, even in those of this court. If

this be sound doctrine, it is as much beyond the power of a legislature, under any pretence, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract, the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors."

And, again, renewing the tradition, he says: (p. 738)

"A statute undertaking to take the property of A. and transfer it to B. is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department of the government."

"A power of Congress," said Mr. Justice Bradley, in his dissent, (p. 744) "even over those subjects upon which it has the right to legislate, is not despotic, but is subject to certain constitutional limitations. One of these is, that no person shall be deprived of life, liberty, or property without due process of law; another is, that private property shall not be taken for public use without just compensation; and a third is, that the judicial power of the United States is vested in the supreme and inferior courts, and not in Congress."

He says further, in language that hits the Ferris Act like a prophecy: "Under the English Constitu-

tion, notwithstanding the theoretical omnipotence of Parliament, such a law as the one in question would not be tolerated for a moment. The famous denunciation that 'it would cut every Englishman to the bone,' would be promptly reiterated." (p. 746)

In the dissenting opinion of Mr. Justice Field (p. 757), it is said:

"When the road was completed in the manner prescribed and accepted, the company became entitled as of right to the land and subsidiary bonds stipulated. The title to the land was perfect on the issue of the patents; the title to the bonds vested on their delivery. Any alteration of the acts under the reservation clauses, or their repeal, could not revoke the title to the land or recall the bonds or change the right of the company to either. So far as these are concerned, the contract was, long before the act of 1878, an executed and closed transaction, and they were as much beyond the reach of the government as any other property vested in private proprietorship."

The government, he adds, "*could not release itself and hold the other party to the contract. It could not change its obligations and hold its rights unchanged. It cannot bind itself as a civil corporation, and loose itself by its sovereign legislative power.*" (p. 759, *Italicized by Mr. Justice Field.*)

And further, and finally, of the government: (p. 760)

"If it had cause of complaint against the company, it could not undertake itself, by legislative decree, to redress the grievance, but was compelled to seek redress as all other civil corporations are compelled, through the judicial tribunals."

In *Chicago and Burlington Railroad against Chicago*, 166 U. S., 226, 235, the court said:

"In *Davidson v. New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See also *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403, 417. Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation."

Authorities might be multiplied indefinitely; it would be pedantry to cite them further. The reservation clause of the Granting Act of July 25, 1866, itself recognized the principle, for it reads (Sec. 12):

“And be it further enacted that Congress may at any time, *having due regard for the rights of said California and Oregon Railroad Companies* add to, alter, amend, or repeal this act.”

The consent of the railroad company was essential to a valid resumption or alteration of its vested rights; its consent should have been had and obtained, as the consent of the Northern Pacific Railroad Company was had and obtained, in the instance of the Relinquishment Act of July 1, 1898, (30 Stat., 597, 620, c. 546), relating to the land grant to that company.

“If any rights had become vested in the Northern Pacific Railroad Company”, said this court, “which could not, against or without its consent, be effected by an enactment like that of 1898, then the objection to legislation, on the ground that it interfered with vested rights, was waived by the acceptance of the act by its successor in interest; for it was entirely competent for the latter company, if it succeeded to all the rights of the railroad grantee, to agree to such a settlement as that devised by Congress”. *Humbird v. Avery*, 195 U. S., 480, 501; see also *United States v. Inman-Paulson Lumber Co.*, 233 Fed., 942.

All this was in the mind of Mr. Justice McKenna, when he wrote into the concluding paragraph of his opinion on the first appeal, that any legislation in

the premises by Congress, should "secure to the defendants all the value the granting acts conferred upon the railroads".

It was not in the mind of the learned author of this opinion, we submit, with deference, nor was it in the mind of the court, that Congress would or could revest itself with the title to lands earned and held by the grantee in complete and absolute ownership, and would or could, as it would now assume to do, dispose of those lands in its own way, at its own time, to its own purchasers, upon its own terms. The opinion of this court should not be strained and warped to mean that a legislative provision, for the disposition of these lands in accordance with some fitting policy, was intended to be a disposition of them by the grantor, or by any one else except the owner of the fee simple title. We have already adverted to this matter of congressional policy and interposition.

The opinion of Mr. Justice McKenna, fairly read, makes this plain enough. He recognizes, as we have pointed out, the relative impracticability of the policy expressed by the covenants, a policy of settlement addressed to lands that were largely insusceptible of settlement. But if those covenants were unworkable, if that policy was not feasible, the remedy did not lie in a disregard of the contract and the law; the railroad company should have gone to Congress for some new disposition, where, alone, the law and policy could be changed, and the sales' re-

quirement made adaptable to the exigency. There would then have been a meeting of minds between grantor and grantee.

"Whatever the difficulties of performance", says Mr. Justice McKenna, in language we have already quoted, "relief could have been applied for and, it might be, have been secured through an appeal to Congress".

And again, the learned Justice observes, in language we beg to repeat:

"The character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action."

And further:

"If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber and Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses,—the *remedy was obvious*. Granting the *obstacles and infirmities*, they were but *promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it.*"

But no relaxation of the law, no change in the statutory policy, was competent to Congress, that went in impairment of vested rights; nor could any remedy be administered by Congress that did not "at the same time secure to the defendants all the value the granting acts conferred upon the railroads." But what was it that the granting acts conferred upon the railroads?—"there was a *complete and absolute grant* to the railroad company with power to sell, *limited only as prescribed*" by the settlers' provisos. And what of those provisos?—"their language is not directive; it is restrictive only. With this exception the grant is unqualified".

Naked Power of Sale in Contradistinction from Estate in Fee.

The Ferris Act, it would seem, goes upon the theory, not of a grant to the railroad company at all, but of a mere naked trust or power to dispose of the lands in the manner specified in the acts and to apply the proceeds to the use and purpose therein described.

It is instructive and interesting at this point to contrast the facts, and the judgments of this court on the facts, in the cases, respectively, of *Rice v. Railroad Company*, 1 Black, 358, and *Schulenberg v. Harriman*, 21 Wall., 44.

In the Rice case, Edmond Rice, claiming as an entryman under the United States, brought an action of trespass against the Minnesota and North-

western Railroad Company, for cutting timber on the land in question. The railroad company justified the cutting of the timber by pleading title to the premises under a railroad land grant.

This land grant, of date June 29, 1854, was made by Congress, in the first instance, to the Territory of Minnesota, in aid of railroad construction. The railroad company succeeded to the right, title and interest of the Territory, afterwards the State, such as it was, by grant from the State, through the act of incorporation. The incorporation act provided, among other things, that "for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted, that any lands that may be granted to the said Territory, to aid in the construction of the said railroad, shall be, and the same are hereby, granted in fee simple absolute, without any further act or deed; and the Governor of this Territory or future State of Minnesota, is hereby authorized and directed, in the name and on behalf of said Territory or State, after the said grant shall have been made by the United States to said Territory, to execute and deliver to said company, such further deed or assurance of the transfer of the said property, as said company may require, to vest in them a perfect title to the same: provided, however, that such lands shall be taken upon such terms and conditions as may be prescribed by the act of Congress granting the same".

Section 1, of the Act of Congress, of June 29, 1854, making the grant, recited:

"That there is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad * * * every alternate section of land, designated by odd numbers, for six sections in width, on each side of said road within said Territory."

It further provided that the land "shall be held by the Territory of Minnesota, for the uses and purposes, aforesaid." This is made very explicit by section 3, which provides that the lands granted to the Territory "shall be subject to the disposition of any legislature thereof, for the purpose aforesaid and no other; nor shall it inure to the benefit of any company heretofore constituted and organized."

It also provided in section 4—and the language here is important to notice—"that the lands hereby granted to said territory shall be disposed of by said territory only in the manner following, that is to say: *no title shall vest in said Territory of Minnesota*, nor shall any patent issue for any part of the lands hereinbefore mentioned, *until a continuous line of twenty miles of said road, shall be completed through the lands hereby granted*"; and further, in the same section, "if said road is not completed within ten years, no further sales *shall be made*, and the land unsold shall revert to the United States".

Such was the granting act of Congress; and such as it was, on the 24th day of August, 1854, Congress passed an act, repealing the act by which the grant had been made on the preceding 29th day of June. It was after the passage of the repealing act that the railroad company did the cutting of the timber, which the entryman imputed as a trespass.

The first question taken up by this court, is whether the railroad company acquired any title or interest in the lands by virtue of its act of incorporation.

"If the defendants", said this court, "acquired such a right, title or interest in the lands, under their original charter, then it is clear that it became a vested interest as soon as the act of Congress went into effect, and on that state of the case, it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void and of no effect", citing *Terrett v. Taylor*, 9 Cranch, 43; *Pawlett v. Clark*, 9 Cranch, 292.

But even if the act of incorporation, for any reason, did not vest in the railroad company an interest in the lands, the plaintiff, suing as an entryman under the United States, would still be confronted with a second question in the case, namely, the effect of the act of Congress, making the grant *to the Territory itself*.

"If the legal effect", said the court, "of the act of Congress, set up in the answer, was to grant to the Territory a beneficial interest in the lands, then it is equally clear that it was not competent for Congress to pass the repealing act and divest the title; and the defendants, on the facts exhibited in the pleadings, although they did not acquire any title under their original charter, are, nevertheless, the rightful owners of the land, by virtue of the first amendment to the same, passed by the Territorial Legislature". It is not material to dwell on this amendment.

"Unless", continues the court, "both of the questions, therefore, are determined in the negative, the judgment of the court below must be affirmed", citing *Fletcher against Peck*, 6 Cranch, 135.

Upon the first question, as to the right of the railroad company to the land, not under the amendment to its charter, but under the original charter itself, it was the conclusion of the court, "that the defendants acquired no right, title or interest in the lands in controversy by virtue of their original charter"; and this, upon the ground that the thing granted was not in the grantor, that is to say, the Territory, at the time the Act of Incorporation was passed, March 4, 1854.

The court then goes to the second question, whether any beneficial interest in the lands, passed to the Territory under the act of Congress set up

in the answer. It is conceded that the familiar clause of the first section pointed to a grant *in praesenti*.

"Standing alone", says the court, "the clause furnishes strong evidence to refute the proposition of the defendants, that a beneficial interest passed *in praesenti* to the Territory; because it is distinctly provided that the lands granted shall be held by the territory for a declared use and purpose, evidently referring to the contemplated railroad, which, when constructed, would be a public improvement of general interest".

The court then notices the third section, providing "that the said lands hereby granted shall be subject to the disposal of any Legislature thereof for the purpose aforesaid, and no other; nor shall they inure to the benefit of any company heretofore constituted or organized".

Much reason exists, it was believed by the court, to conclude that the railroad company fell within the prohibition of this section, as being a company "heretofore constituted and organized". And in any event, it was the view of the court that, under the first and third sections, it was the intent of Congress to restrict the authorities of the Territory, so far as their control of the lands was concerned, to the strict and special purpose expressed in the act.

"But, restricted as the authorities of the Territory were, by those limitations and provisions",

the court continues, "their hands were still more closely tied by the provisions of the fourth section, which remained to be considered". And it is in the discussion of the fourth section, that the conception of a naked power of sale, in contradistinction from an estate in fee, emerges".

"By the fourth section," says the court, "it is provided, 'that the lands hereby granted to the said Territory shall be disposed of by said Territory only in the manner following—that is to say, *no title shall vest* in said territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, *until* a continuous length of twenty miles of said road shall be completed through the lands hereby granted' ".

The court goes on:

"Certain lands are granted to the Territory by the first section, to be held by it for a specified use and purpose, for the construction of a specific public improvement, and to be exclusively applied to that purpose, without any other restriction, except that the lands could be disposed of only as the work progressed. To carry out that purpose, the lands were declared by the third section, to be subject to the future disposal of the Territorial Legislature, but that in no event should they inure to the benefit of any company previously constituted and organized. Neither of those sections contained any words which necessarily and absolutely vested in the territory

any beneficial interest in the thing granted. Undoubtedly, the words employed are sufficient to have that effect; and if not limited or restricted by the context or other parts of the act, they would properly receive that construction; but the word, grant, is not a technical word like the word, *enfeoff*; and although, if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the *grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantor*". (1 Black, p. 378)

The court proceeds:

"It is expressly provided by the fourth section of the Act that *no title shall vest* in the Territory of Minnesota, nor shall any patent issue for any part of the lands, until a continuous length of twenty miles of the road shall be completed. Unless that whole provision, therefore, be rejected as without meaning, or is repugnant to the residue of the act, it is not possible, we think, to hold that the territory acquired a *vested* interest in the lands *at the date of the act*: and yet the fourth section contains the same words of grant as are to be found in the first and third, and no reason is perceived for holding they are not used in the same sense. It is insisted by the defendants that the provision does not divest

the grant of a present interest; that it only so qualifies the power of disposal that the Territory cannot place the title beyond the operation of the condition specified in the grant. But they do not attempt to meet the difficulty that, by the express words of the act, the *absolute title remained* in the grantor, at least until twenty miles of the road were completed: nor do they even suggest by what process of reasoning the four words, 'no title shall vest', can be shorn of their usual and ordinary signification, except to say that it would be doing great injustice to Congress to hold, notwithstanding the words of the first section, that no title passed to the grantee. Whether the provision be just or unjust, the words mentioned are a part of the act, and it is not competent for this court to reject or disregard a material part of an act of Congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together. On the other hand, if it be assumed that the Territory acquired but a *mere naked trust or power* to dispose of the lands, and carry out the contemplated public improvements therein described, then the whole act is consistent and harmonious". (p. 379)

In fine, as the court sums it up, "it is clear that the Territory acquired nothing under the act of Congress set up in the answer, but a *mere naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein described*". (p. 381)

In such event, the court holds "Congress could at any time repeal the act, creating the trust, *if not executed*, and withdraw the power". (p. 381)

It was suggested to the court that this doctrine of a mere naked trust or power to dispose of the lands and to apply the proceeds, would be applicable to all the railroad grants made by Congress to the states and territories. And the court answered:

"Of course, the suggestion is correct, if such other grants are made in the same terms, and are subject to the same limitations, restrictions and prohibitions; but we have looked into that subject, and think it proper to say, that we see no foundation whatever for the suggestion. One of these grants came under the revision of the court, in the case of *Lessieur against Price*, (12 How., 76) and this court held, and we have no doubt, correctly, that there was a present grant, and that the legislature was vested with full power to select and locate the land, but the case is so *unlike the present*, that we do not think it necessary to waste words in pointing out the distinction". (p. 381-2)

The *Rice case* was decided by this court at the December term, 1861. *Schulenberg against Harri-*
man, 21 Wall, 44, was decided at the October term, 1874. The Schulenberg case, like the Rice case, turned on the right to severed timber; to some sixteen hundred thousand feet of pine saw-logs, which had been cut on the land in question—land which had been

granted by Congress to the State of Wisconsin, in aid of railroad construction. We have been over this case. The defendant, Harriman, who had seized the logs, stood upon the title of the State of Wisconsin, as the congressional grantee of the land, but the railroad had never been constructed; the time for the construction had long since passed; and the construction of the road within a specified time was a condition subsequent. No forfeiture, however, had been declared by Congress, and this court held that until Congress should resume the title by declaration of forfeiture, as for breach of the condition subsequent, the title to the land was still in the grantee and Harriman, as agent of the grantee, was entitled to the cut timber. Counsel for Schulenberg put the strain of his case on the decision in *Rice against Railroad Company, supra*. He argued that the interest of the grantee, the State of Wisconsin, was "a mere naked trust or power". (21 Wall, p. 53)

This court declined to yield to the argument, distinguished the Rice case, and held the act of Congress to be a present grant to the State of Wisconsin.

"That the Act of Congress of June 3, 1856", said Mr. Justice Field, "passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, '*that there be, and is hereby, granted to the State of Wisconsin*' the lands specified. The third section

declares 'that the lands *hereby granted* to said state shall be subject to the disposal of the legislature thereof'; and the fourth section provides *in what manner sales shall be made*, and enacts that if the road be not completed within ten years, 'no further sale shall be made, and the lands unsold shall *revert* to the United States'. The power of disposal and the provision for the lands reverting both imply, what the first section in terms declares, that a grant is made, that is, that the *title is transferred to the State*". (p. 60)

"The case of *Rice against Railroad Company*, reported in the first of Black", Mr. Justice Field continues, "does not conflict with these views. The words of present grant in the first section of the act, there under consideration, were restrained by a provision in a subsequent section declaring that the *title should* not vest in the Territory of Minnesota until the road or portions of it were built". (p. 62)

Indeed, if it be necessary, we can vouch the Government into court, as a warrantor of the grants in question here, as falling under the rule and distinction of the *Schulenberg case*.

In the report of the Commissioner of the General Land Office for 1906, at pages 21 and 22, the Oregon and California Land Grant is dealt with.

"The grant of the Oregon and California Railroad Company", says the Commissioner, "under the Act of July 25, 1866, embraced 3,821,901.80 acres. The

prescribed conditions of the grant not having been met by the company, the time for performance was extended by the Act of April 10, 1869. Although the company failed to comply with the terms within the time specified, it complied with them substantially before a forfeiture, and *title* to all the lands consequently *vested* in the company (see *Schulenberg against Harriman*, 21 Wall., 44), subject only to the covenant expressed in the proviso of the Act of 1869, which declares that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre”.

And on March 19, 1907, the Commissioner of the General Land Office, soon to become Secretary of the Interior, wrote to Hon. W. C. Hawley, representative in Congress, from Oregon, the following letter:

“Department of the Interior.

“General Land Office, Washington, D. C.

“March 19, 1907.

“Honorable W. C. Hawley, House of Representatives—

“Sir: In reply to your letter of the 7th inst. addressed to the Secretary of the Interior, and handed to me for attention, you are advised that the Act of 1866 made a grant of lands to the California and Oregon Railroad Companies conditioned upon the performance of certain acts by the company within a specified

time. The prescribed conditions not having been met by the company, the time of performance was extended by the Act of 1869 and, although the company failed to comply with the terms of the grant before the time specified they were subsequently complied with before a forfeiture, and title to all the land within the grant consequently vested in the company (See *Schulenberg v. Harriman*, 21 Wall., 44), subject only to the covenant expressed in the proviso contained in the Act of 1869, which declares that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter-section to one purchaser, and for a price not exceeding \$2.50 per acre. As soon as *the title vested* in the company, the *jurisdiction* over the lands *passed from the executive branch* of the Government, and the enforcement of the provision *rests with the courts*, through appropriate action by either the settlers entitled to purchase or by the government acting through the Department of Justice."

The Commissioner goes on to say that in his judgment the power of Congress to prescribe the proviso cannot be questioned, and he puts it on the ground that the proviso "was made in consideration of the extension of time granted to the company."

"The company," he adds, "is therefore without authority to sell the lands to any other person, in

any other amount, or for a greater price than prescribed in the proviso; and any conveyance which the company has attempted to make on a sale made in violation of the statute would not be sustained by the courts. Since title passed from the Government, subject only to the covenants created by the proviso, it is doubtful if Congress has power to enact any law to compel a compliance with the terms of the provision, and the covenant can only be enforced in the courts".

The joint resolution, authorizing the Attorney General to bring the pending suit, was approved April 30, 1908, (35 Stat., 571). The bill of complaint in the pending suit was filed September 4, 1908. This makes the report of the Commissioner of the General Land Office for 1906, and the Commissioner's letter of March 19, 1907, of special interest. They were not declarations *post litem motam*.

Reservation Clause in the Act of July 25, 1866.

The Act of May 4, 1870, making the west side grant, has no reservation clause. Section 12 of the Act of July 25, 1866—the Act making the east side grant—is as follows:

"And it be further enacted, that Congress may, at any time, having *due regard for the rights of said California and Oregon Railroad Companies* add to, alter, amend, or repeal this Act".

These reservation clauses are familiar; they have often been before the courts—many times before this court. Nothing is better settled, than that the power of the Legislature, under such a clause, is not unlimited; vested rights, already acquired under the operation of the unaltered or unrepealed statute, are beyond the power of the Legislature, are protected by the constitutional guaranty of due process of law. Chief Justice Shaw blazed the way in *Commonwealth against Essex Company*, 13 Gray, 239, 253:

“It seems to us”, he says, “that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land, for purposes connected with its business; and they purchased such lot from a third party; could the Legislature prohibit the company from holding it? If so, in whom should it vest; or could the Legislature direct it to revert in the grantor or escheat to the public; or how otherwise? * * * Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: that where, under power in a charter, *rights have been acquired and become vested*, no amendment or alteration of the charter can take away the property or rights, which become vested under a legitimate exercise of the powers granted.”

This was taken as a postulate in the Sinking-Fund cases, as well in the prevailing, as in the dissenting opinions.

"That this power", said Mr. Chief Justice Waite, "has a limit, no one can doubt. All agree that it cannot be used to take *property already acquired*, under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made".

The legislature exercising this reserved power, the Chief Justice went on to say, "cannot undo what has already been done, and it cannot unmake contracts that have already been made". (99 U. S. pp. 720-721).

Mr. Justice Strong, in dissenting, said: "All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus:

"It must be exercised when exerted at all, so as to do no injustice to those to whom the franchise has been granted. Certainly the reservation cannot mean a right to take away the franchise, in whole or in part, and yet hold *the grantee to the performance of the duties assumed*—the *consideration*, given for the grant". (p. 741)

He quotes the language of Mr. Chief Justice Shaw, excerpted above, and turns to the opinion of this court, in *Miller against the State*, 15 Wall. 478, where it was said by Mr. Justice Clifford:

"Power to legislate, founded upon such a reservation in a charter of a private corporation, is certainly not without limitations, and it may well be admitted that it cannot be exercised to take away or destroy rights *acquired* by such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation". (p. 742)

Mr. Justice Bradley, also dissenting, speaks of the reservation clause: (p. 749)

"It certainly cannot be interpreted as reserving a right to violate a contract at will. No Legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will; but never to violate a contract, or to change its terms *without the consent of the other party.*"

"The reserved power in question," he continues, "is simply that of legislation—to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable".

And by Mr. Justice Field, in the same case, it was said of the reserved power:

"It cannot be exerted to effect the contract so far as it has been executed, or the rights vested under it. When the road was completed in the manner prescribed and accepted, the company became entitled as of right to the land and subsidy bonds stipulated. The title to the land was perfect on the issue of the patents; the title to the bonds vested on their delivery. Any alteration of the acts, under the reservation clauses or their repeal could not revoke the title to the land or recall the bonds, or change the right of the company to either. (p. 757)"

In *Stearns against Minnesota*, 179 U. S. 223, 259, it was held that the reserved right to amend a corporation charter "does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice, by taking of property without due process of law". And it was said of the guaranty of "due process", in *Ochoa against Hernandez*, 230 U. S. 140, 161:

"Without the guaranty of 'due process', the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before the Magna Charta, was embodied in that charter (Coke. 2. Inst., 45, 50); and has been recognized since the Revolution as among the safest foundations of our institutions.

Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing".

"The courts have often held", it was said in *Bienville Water Supply Company against Mobile*, 186 U. S., 212, 222, "that it was not within the power of the Legislature, under the guise of an act amending or repealing a charter, to take away the property of the corporation". (See also *Chicago, M. & St. P. RR. v. Wisconsin*, 238 U. S., 491, 501-2); *Houston and Texas Central Railway v. Texas*, 170 U. S., 243, 254-5; *United States v. U. P. Ry.*, 160 U. S. 1, 32-3; *Detroit v. Detroit P. R. Co.*, 43 Mich., 140, 146-148, opinion by Cooley, J.

It is to be said, with propriety, of the effect of the Ferris Act, as Judge Cooley said of a Michigan Statute, in the case last cited:

"A statute which could have this effect, would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation but of spoliation",

In the very recent case in this court of *Long Sault Development Company v. Call*, opinion by Mr. Justice Clarke, decided December 11, 1916, it was said:

"The grants of the Acts of 1907 are such that, if it was a valid law, upon their being accepted, they constituted property or contract rights, of which the plaintiff could not be deprived, and which could not be impaired, by subsequent legislation; and, therefore, the denial by the defendant in error of the jurisdiction of this court renders it necessary for us to determine whether the Court of Appeals in its decision, gave any effect to the repealing act."

On looking into the opinion of the Court of Appeals, for its consideration of the repealing act in question,—an Act of the Legislature of New York of 1913—Mr. Justice Clarke finds, "not only did it not give to it an effect which would impair any contract relation springing from the Act of 1907, but * * on the contrary, it concluded that the repeal 'could not operate to confiscate any valid franchise or property right, which the Long Sault Development Company had previously acquired under the act repealed'".

The Question of Condemnation.

We can scarcely believe that the Ferris Act will be defended, as a taking of property for public use with just compensation. It was a taking of property—this is clear enough—a down-right forfeiture, but it was not a taking for a public use. It was a resumption by the grantor of property that had been contracted for, earned and conveyed; and the

grantee, to whom the grant has been, as we have shown, a source of expense and loss, is relegated to a dwindling and vanishing expectancy, contingent on the grantor's administration of the forfeited grant for a period of ten years. Such is this extraordinary statute. But we need not labor the point. As this Court said, in *Monongahela Navigation Co. v. United States*, 148 U. S., 312, 327:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The Legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that a just compensation shall be paid, and the ascertainment of that is a judicial inquiry".

III.

COSTS WERE IMPROPERLY TAXED AGAINST THESE APPELLANTS.

The great question in the case, upon which the decision of the District Court in the first instance, and afterwards of the Supreme Court, turned, was the question of forfeiture—whether the settlers'

clause was a condition subsequent or a covenant. Upon that question these appellants prevailed. It may be suggested that we put testimony into the record, going to the questions of estoppel, assent and waiver, as against the right of the government to urge a violation on our part of the covenants, and it is true that the case did not go off upon the question of waiver or estoppel. But this same testimony, so put by us into the record, had its bearing upon the point on which the case was made to turn—that is to say, the question whether the settlers' clause was a condition subsequent, for it went to the question of practical and contemporaneous exposition of the statute—and more particularly of its exposition at the hands of the executive Department, charged with the administration of the law. It went to show by such exposition that the settlers' clause had been expounded and construed, in practice, as a covenant. This was recognized in the opinion of the Supreme Court, 238 U. S., at pages 424-5, where it is said:

“It is contended that if sales were made under the limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the government are adduced—indeed the knowledge of Congress itself; and reciting what was done under the grants, counsel say: ‘It is a story of mortgages and sales, executory contracts and conveyances, and a stream of government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety,

of public record; the railroad knew them; the people knew them, the government knew them.' And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers the *provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel.*"

And if it be suggested, as it was suggested by the District Judge, that the United States "was required to bring this suit in order to determine as to the violations of this proviso, and the government has prevailed in the end and the court has declared that the railroad company has violated the provisos—I think for that reason the government should recover costs," the answer is not difficult. The government, in the first place never brought suit to determine as to the violations of the proviso on its own initiative. It was memorialized to do so, as we pointed out, by the Legislature of Oregon: and that memorial did not come into being until the year 1908, some forty years after the passage of the granting act, and more than thirty years after the administration of this grant, as it was administered by the railroad company had become a "matter of common knowledge, of notoriety, of public record."

The transactions of the railroad company in respect to the sales of these lands, as we have already noticed, were communicated in a detailed and itemized way to the bureau of the Interior Department, specially constituted to have such matters in charge, the transactions were communicated by the bureau to the Secretary of the Interior, by him to the President and by the President to Congress. It is, we submit with deference, not equitable upon the grounds suggested and in view of the long and known history of the transactions, to tax costs against the railroad company, after it has prevailed in the substantive contention, upon a suggestion that the government was required, by the fault of the railroad company, to bring this suit "to determine as to the violations of this proviso". The temporary injunction, which the government now seeks to import by this decree into the general injunction against future violations of the covenants, itself rested upon the very testimony which we put into this record as to the non-settlement character of the lands. The Supreme Court in its opinion, as we have quoted it, sums up that testimony and makes it the basis and explanation of the reference of the subject matter to Congress. It is, we think, a most unusual assessment of costs, under the circumstances of this case, to penalize these appellants, as this decree does, with costs taxed at \$6,249.02.

In the case of Northern Trust Company vs. Snyder, 77 Fed. 818, the court said:

"Without undertaking to go further than the case before us requires, we are of the opinion that the appellant is entitled to the costs of this appeal. The appellant has succeeded in reversing the decree in the most important part, so far as the amount of money is concerned. It is true the appeal was from the entire decree, and that the appellant contested the right of the appellee to the recovery of any amount. We think, however, it would be a harsh rule that would deprive an appellant of the statutory costs of appeal unless success attended the whole contention. Where the appeal has substantially prevailed we perceive no reason to deny to appellant the statutory costs which have been incurred in the successful attempt to assert a right."

While this language was used of costs on an appeal, it expresses the spirit and principle by which a court should be moved, a court of equity especially, in determining the assessment of costs.

In Street on Federal Equity Practice (Section 2022) it is said:

"Situations frequently arise where it is deemed inequitable for all the costs to be imposed on either party exclusively, and where this appears to be the case, the case may be disposed of without adjudging costs in favor of either, but leaving each to bear the costs of his own side of the litigation".

Of course, we are not authorized to ask for costs against the United States; but it must excite some

special wonder that an application should have been made here by the government for costs, in view of the principal question at issue, on which the government argued and staked its case, and of the final adjudication of that question in the Supreme Court of the United States. It will excite some surprise that the government, defeated in its contention, should come to the court of first instance, and ask that these appellants be penalized in costs because they prevailed on the turning point of the case.

It is now respectfully submitted that the decree of the District Court, herein appealed from, is not in accordance with the opinion of the Supreme Court, and that it should be reversed, with directions to enter a decree, pursuant to the mandate of the Supreme Court of the United States, and without costs on the appellants; and such a decree, it is respectfully submitted, is the decree which the appellants proposed to the District Court and which is set forth in the transcript of this record.

It is further respectfully submitted that the invalidity of the Ferris Act should be pronounced.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,

*Solicitors for Defendants and Appellants,
Oregon and California Railroad Com-
pany, Southern Pacific Company, and
Stephen T. Gage, Individually and as
Trustee.*

FRANK C. CLEARY,
Of Counsel.

APPENDIX A.

DECREE ON MANDATE OF UNITED STATES
SUPREME COURT.

*In the District Court of the United States for the
District of Oregon.*

No. 3340.

DECREE.

The United States of America,
Complainant,

vs.

Oregon & California Railroad Company,
et al,

Defendants,

John L. Snyder, et al,

Defendants and Cross-Complainants,
William F. Slaughter, et al,

Interveners.

In pursuance of the mandate of the Supreme Court of the United States filed in this court on the 8th day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed as follows:

1. That the decree heretofore entered in said cause so far as it affects the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from

said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral, or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands *sold prior* to the institution of the action which have *since reverted* or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights or remedies which the government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 20, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6,249.02, and that execution issue therefor.

Done in open court this 9th day of December, 1915.

BY THE COURT.

Chas. E. Wolverton, Judge.

APPENDIX B.

(TITLE OF COURT AND CAUSE, AS CONTAINED IN FOREGOING DECREE, APPENDIX A.)

In pursuance of the mandate of the Supreme Court of the United States, filed in this Court on the — day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the "defendants," be, and the same is, hereby set aside, and held for naught, but adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the "interveners."

2. That the said defendants and their respective officers and agents be and each is hereby enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

3. That the said defendants and their respective officers and agents be, and each is hereby enjoined from any disposition of said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants, all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act.

Done in open court this——day of——, 1915.

BY THE COURT,

Judge.”

APPENDIX C.

THE FERRIS ACT.

[PUBLIC—No. 86—64TH CONGRESS.]

[H. R. 14864.]

An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, and to alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May fourth, eighteen hundred and seventy, and for other purposes.

Whereas by the Acts of Congress approved April tenth, eighteen hundred and sixty-nine (Fourteenth Statutes at Large, page two hundred and thirty-nine), and May fourth, eighteen hundred and seventy (Sixteenth Statutes at Large, page ninety-four), it was provided that the lands granted to aid in the construction of certain railroads from Portland, in the State of Oregon, to the northern boundary of the State of California, and from Portland to Astoria and McMinnville, in the State of Oregon, should be sold to actual settlers only, in quantities not exceeding one hundred and sixty acres to each person and at prices not greater than \$2.50 per acre; and

Whereas the Oregon and California Railroad Company, beneficiary of said acts, has violated the terms under which the said lands were granted by

selling certain of said lands to persons other than actual settlers, by selling in quantities of more than one-quarter section to each person, by selling at prices in excess of \$2.50 per acre, and by refusing to sell any further portions of such lands to actual settlers at any price, and in so doing has willfully violated the terms of the statutes by which the said lands were granted; and

Whereas in the suit instituted by the Attorney General of the United States, pursuant to the authority and direction contained in the joint resolution of April thirtieth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page five hundred and seventy-one), the Supreme Court of the United States, in its decision rendered June twenty-first, nineteen hundred and fifteen (Two hundred and thirty-eighth United States, page three hundred and ninety-three), ordered that the Oregon and California Railroad Company be enjoined from making further sales of lands in violation of the law, and that the said railroad company be further enjoined from making any sales whatever of either the land or the timber thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands in accordance with such policy as Congress might deem fitting under the circumstances and at the same time secure to the railroad company all the value conferred by the granting Acts; and

Whereas it was expressly provided by section twelve of the Act of July twenty-fifth, eighteen hundred

and sixty-six (Fourteenth Statutes at Large, page two hundred and thirty-nine), that Congress might at any time, having due regard for the rights of the grantee railroad company, add to, alter, amend, or repeal the Act making the grant; and

Whereas the Oregon and California Railroad Company and its predecessors in interest received a large sum of money from sales of said land for prices in excess of \$2.50 per acre, and from leases, interest on contracts, and so forth; and

Whereas the aforesaid granting Acts conferred upon the said railroad company the right to receive not more than \$2.50 per acre for each acre of land so granted: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to so much of the lands granted by the Act of July twenty-fifth, eighteen hundred and sixty-six, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, and to so much of the lands granted by the Act of May fourth, eighteen hundred and seventy, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," for which

patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, as had not been sold by the Oregon and California Railroad Company prior to July first, nineteen hundred and thirteen, be, and the same is hereby, revested in the United States: *Provided*, That the provisions of this Act shall not apply to the right of way to the extent of one hundred feet in width on each side of the railroad and all lands in actual use by said railroad company on December ninth, nineteen hundred and fifteen, for depots, sidetracks, wood yards, and standing grounds.

SEC. 2. That the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, is hereby authorized and directed, after due examination in the field, to classify said lands by the smallest legal subdivisions thereof into three classes, as follows:

Class one. Power-site lands, which shall include only such lands as are chiefly valuable for water-power sites, which lands shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public lands of like character.

Class two. Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision.

Class three. Agricultural lands, which shall include all lands not falling within either of the two other classes:

Provided, That any of said lands, however classified, may be reclassified, if, because of a change of

conditions or other reasons, such action is required to denote properly the true character and class of such lands: *Provided further*, That all the general laws of the United States now existing or hereafter enacted relating to the granting of rights of way over or permits for the use of public lands shall be applicable to all lands title to which is revested in the United States under the provisions of this Act. All lands disposed of under the provisions of this Act shall be subject to all rights of way which the Secretary of the Interior shall at any time deem necessary for the removal of the timber from any lands of class two.

SEC. 3. That the classification provided for by the preceding section shall not operate to exclude from exploration, entry, and disposition, under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands, except power sites: *Provided*, That any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided in section four, but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States.

SEC. 4. That nonmineral lands of class two shall not be disposed of until the Secretary of the Interior has determined and announced that the merchantable timber thereon has been removed, and thereupon said lands shall fall into class three and

be disposed of in the manner hereinafter provided for the disposal of lands of that class.

The timber on lands of class two shall be sold for cash by the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof, at such times, in such quantities, and under such plan of public competitive bidding as in the judgment of the Secretary of the Interior may produce the best results: *Provided*, That said Secretary shall have the right to reject any bid where he has reason to believe that the price offered is inadequate, and may reoffer the timber until a satisfactory bid is received: *Provided further*, That upon application of a qualified purchaser that any legal subdivision shall be separately offered for sale such subdivision shall be separately offered before being included in any offer of a larger unit, if such application be filed within ninety days prior to such offer: *And provided further*, That said timber shall be sold as rapidly as reasonable prices can be secured therefor in a normal market.

The Secretary of the Interior shall as soon as the purchase price is fully paid by any person purchasing under the provisions of this section issue to such purchaser a patent conveying the timber and expressly reserving the land to the United States. The timber thus purchased may be cut and removed by the purchaser, his heirs or assigns, within such period as may be fixed by the Secretary of the In-

terior, which period shall be designated in the patent; all rights under said patent shall cease and terminate at the expiration of said period: *Provided*, That in the event the timber is removed prior to the expiration of said period the Secretary of the Interior shall make due announcement thereof, whereupon all rights under the patent shall cease.

No timber shall be removed until the issuance of patent therefor. All timber sold under this Act shall be subject to the taxing power of the States apart from the land as soon as patents are issued as provided for herein.

SEC. 5. That nonmineral lands of class three shall be subject to entry under the general provisions of the homestead laws of the United States, except as modified herein, and opened to entry in accordance with the provisions of the Act of September thirtieth, nineteen hundred and thirteen (Thirty-eighth Statutes at Large, page one hundred and thirteen). Fifty cents per acre shall be paid at the time the original entry is allowed and \$2 per acre when final proof is made. The provisions of section twenty-three hundred and one, Revised Statutes, shall not apply to any entry hereunder and no patent shall issue until the entryman has resided upon and cultivated the land for a period of three years, proof of which shall be made at any time within five years from date of entry. The area cultivated shall be such as to satisfy the Secretary of the Interior that the entry is made in good faith for the purpose of settlement and not for speculation: *Provided*, That the payment of \$2.50 per acre

shall not be required from homestead entrymen upon lands of class two when the same shall become subject to entry as agricultural lands in class three: *Provided further*, That during the period fixed for the submission of applications to make entry under this section any person duly qualified to enter such lands who has resided thereon to the same extent and in the same manner as is required under the homestead laws, since the first day of December, nineteen hundred and thirteen, and who has improved the land and devoted some portion thereof to agricultural use, and who shall have maintained his residence to the date of such application, shall have the preferred right to enter the quarter section upon which he was so residing whether such lands shall be of class two or class three and where such quarter section does not contain more than one million two hundred thousand feet board measure of timber, and where the quarter section contains more than the said quantity of timber such person may enter the forty-acre tract, or lot or lots containing approximately forty acres, upon which his improvements, or the greater part thereof, are situated: *Provided further*, That a prior exercise of the homestead right by any such person shall not be a bar to the exercise of such preference rights: *And provided further*, That all of the following described lands which may become revested in the United States by operation of this Act, to-wit: Township one south, range five east, sections twenty-three and thirty-five township one south, range six east, sections three, five, seven, nine, seventeen, nineteen, twenty-nine, thirty-one,

and thirty-three; township two south, range five east, sections one and three; township two south, range six east, sections one, three, five, seven, nine, and eleven; township two south, range seven east, section seven; township three south, range three east, section fifteen; township four south, range four east, sections eleven and thirteen; township four south, range five east, sections nineteen and twenty-nine; and township twelve south, range seven west, sections fifteen, twenty-one, twenty-three, twenty-seven, thirty-three, and thirty-five, Willamette meridian and base, State of Oregon, shall be withheld from entry or other disposition for a period of two years after the approval hereof.

SEC. 6. That persons who purchase timber on lands of class two shall be required to pay a commission of one-fifth of one per centum of the purchase price paid, to be divided equally between the register and receiver, within the maximum compensation allowed them by law; and the register and receiver shall receive no other compensation whatever for services rendered in connection with the sales of timber under the provisions of section four of this Act.

SEC. 7. That the Attorney General of the United States be, and he is hereby, authorized and directed to institute and prosecute any and all suits in equity and actions at law against the Oregon and California Railroad Company, and any other proper party which he may deem appropriate, to have determined the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of said granted

lands, whether sold or unsold, patented or unpatented, and which should be charged against it as a part of the "full value" secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court. In making this determination the court shall take into consideration and give due and proper legal effect to all receipts of money from sales of land or timber, forfeited contracts, rent, timber depredations, and interest on contracts, or from any other source relating to said lands; also to the value of timber taken from said lands and used by said grantees or their successor or successors. In making this determination in the aforementioned suit or suits the court shall also determine on the application of the Attorney General, the amount of the taxes on said lands paid by the United States, as provided in this Act, and which should in law have been paid by the said Oregon and California Railroad Company, and the amount thus determined shall be treated as money received by said railroad company.

SEC. 8. That the title to all money arising out of said grant lands and now on deposit to await the final outcome of said suit commenced by the United States in pursuance of said joint resolution of nineteen hundred and eight is hereby vested in the United States, and the United States is subrogated to all the rights and remedies of the obligee or obligees, and especially of Louis L. Sharp as commissioner, under any contract for the purchase of timber on the grant lands.

SEC. 9. That the taxes accrued and now unpaid on the lands revested in the United States, whether

situate in the State of Oregon or State of Washington, shall be paid by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the approval of this Act, and a sum sufficient to make such payment is hereby appropriated, out of any money in the Treasury not otherwise appropriated.

SEC. 10. That all moneys received from or on account of said lands and timber under the provisions of this Act shall be deposited in the Treasury of the United States in a special fund, to be designated "The Oregon and California land-grant fund," which fund shall be disposed of in the following manner: The Secretary of the Interior shall ascertain as soon as may be the exact number of acres of said lands, sold or unsold, patented to the Oregon and California Railroad Company, or its predecessors, and the number of acres of unpatented lands which said railroad company is entitled to receive under the terms of said grants and the value of said lands at \$2.50 per acre. From the sum thus ascertained he shall deduct the amount already received by the said railroad company and its predecessors in interest on account of said lands and which should be charged against it as determined under section seven of this Act; and a sum equal to the balance thus resulting shall be paid, as herein provided, to the said railroad company, its successors or assigns, and to those having liens on the land, as their respective interests may appear. The amount due lien holders shall be evidenced either by the consent, in writing, of the railroad company or by a judgment of a court of competent jurisdiction in a suit

to which the railroad company and the lien holders are parties. Payments shall be made from time to time, as the fund accumulates, by the Treasurer of the United States upon the order of the Secretary of the Interior: *Provided, however,* That if, upon the expiration of ten years from the approval of this Act, the proceeds derived from the sale of lands and timber are not sufficient to pay the full amount which the said railroad company, its successors or assigns, are entitled to receive, the balance due shall be paid from the general funds in the Treasury of the United States, and an appropriation shall be made therefor. After the said railroad company, its successors or assigns, and the lien holders shall have been paid the amount to which they are entitled, as provided herein, an amount equal to that paid for accumulated taxes, as provided in section nine hereof, shall be deposited in the Treasury to the credit of the United States, thereafter all other moneys received from the sales of land and timber shall be distributed as follows:

A separate account shall be kept in the General Land Office of the sales of land and timber within each county in which any of said lands are situated, and, after deducting from the amount of the proceeds arising from such sales in each county a sum equal to that applied to pay the accrued taxes in that county and a sum equal to \$2.50 per acre for each acre of such land therein title to which is re-vested in the United States under this Act, twenty-five per centum of the remainder shall be paid to the State treasurer of the State in which the land is located, to be and become a part of the irreducible

school fund of the State; twenty-five per centum shall be paid to the treasurer of the county for common schools, roads, highways, bridges, and port districts, to be apportioned by the county courts for the several purposes above named; forty per centum shall be paid into, reserved, and appropriated as a part of the fund created by the Act of Congress approved June seventeenth, nineteen hundred and two, known as the reclamation Act; ten per centum shall become a part of the general fund in the Treasury of the United States; and of the balance remaining in said Oregon and California land grant fund from whatsoever source derived twenty-five per centum shall be paid to the State treasurer of the State in which the land is located, to be and become a part of the irreducible school fund of the State; twenty-five per centum shall be paid to the treasurer of the county for common schools, roads, highways, bridges, and port districts, to be apportioned by the county courts for the several purposes above named; and the remainder shall become a part of the general fund in the Treasury of the United States. The payments herein authorized shall be made to the treasurers of the States and counties, respectively, by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the close of each fiscal year during which the moneys were received: *Provided*, That none of the payments to the States and counties and to the reclamation fund in this section provided for shall be made until the amount due the Oregon and California Railroad Company, its successors or assigns, has been fully paid, and the Treasury re-

imbursed for all taxes paid pursuant to the provisions of section nine of this Act.

SEC. 11. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect; and any person, applicant, purchaser, entryman, or witness who shall swear falsely in any affidavit or proceeding required hereunder or under the regulations issued by the Secretary of the Interior shall be guilty of perjury and liable to the penalties prescribed therefor.

SEC. 12. That the sum of \$100,000 be, and the same is hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to complete the classification of the lands as herein provided, which amount shall be immediately available and shall remain available until such classification shall have been completed.

Approved, June 9, 1916.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

OREGON & CALIFORNIA RAILROAD
COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES.

} No. 492.

ON A CERTIFICATE FROM AND CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF—AMICUS CURIA.

CHAMBERLAIN-FERRIS ACT INVALID.

The Chamberlain-Ferris Act is invalid because it is an attempt to take private property without just compensation and for private use, and also without due process of law.

On the former appeal in this case it was held by this Court that the Oregon & California Railroad Company has a "complete and absolute grant" of the lands involved in the Chamberlain-Ferris Act, and that its power to sell such land is "limited only as prescribed" in the granting acts; or, in other words, that the Railroad Company is vested with a complete and absolute title to the lands. It further held that the provisos in the grant are not conditions subsequent; and that, consequently, it is not subject to forfeiture by reason of

any act or omission on the part of the Railroad Company in respect thereto.

In other words, this Court held that an indefeasible and irrevocable title to the land is vested in the Railroad Company.

The Government attempted to secure a forfeiture of the grant through judicial proceedings, and this Court reversed the judgment of the trial court decreeing such forfeiture, and held that under the terms of the acts of Congress by which the grant was made, the Government could not secure a mandatory injunction compelling the Railroad Company to permit settlers to go upon the land or to make sales thereof to them.

This Court held that the only judgment to which the Government was entitled under its pleadings was "a reversal of the decree of the District Court, and "an injunction against further violations of the covenants."

This Court recognized the fact that an injunction against further violations of the covenants would be "imperfect relief", but, it said "We can only enforce the provisos as written, not relieve from them." It also said, the language of the proviso "is not directive; it is restrictive only."

Moreover, this Court said:

"We agree with the Government that the Company might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres. And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed;" etc.

Obviously it was for these reasons that this Court did not give the relief which was prayed for by the Government in its complaint, as follows:

"(3) That a mandatory injunction shall issue out of and under the seal of this Court, *command-*

ing and requiring the said defendant Oregon and California Railroad Company to offer for sale, and sell and convey, said unsold lands to any bona fide actual settler who may apply to purchase the same in good faith, in quantities not exceeding one hundred and sixty acres, or one quarter section, for the price of two dollars and fifty cents per acre, under such restrictions, in such manner and by such methods as the Court shall deem adequate and expedient; and providing that any and all persons who may be in any way aggrieved by the refusal or neglect of said defendant Oregon and California Railroad Company to sell or convey said lands to him or them in conformity with the terms hereof, or who may be in any other manner aggrieved in the premises, and hereafter apply to the Court, at the foot of said judgment and decree, for the enforcement thereof in his or their behalf."

It is well settled that a judgment or decree must be interpreted in the light of the matters that were before the Court, and that the record on a former appeal may be looked into for this purpose.

It seems perfectly plain, therefore, that this Court did decide upon the former appeal that, unless and until the granting acts (in so far as they are laws) are added to, altered, or amended, the courts possess *no power to compel* the Railroad Company to permit settlers to go upon its lands or to sell the same to settlers or otherwise or at all. The Railroad Company may continue to choose the actual settler and the time for selling, and the Courts cannot interfere with its discretion in these particulars.

It seems equally plain that Congress has no power, *without the consent of the Railroad Company*, to add to, alter, or amend the granting acts so as to change in any substantial respect the contractual relations which have thereby been established between the Government and the Railroad Company, or so as to impair in any substantial degree the rights of ownership and

the indefeasible and irrevocable "complete and absolute" title which has vested in the Railroad Company under said granting acts.

It appears, however, that it was contended by the Government that more than 1,000 persons had made application to purchase from the Railroad Company *in conformity to the covenants* in the grant, and that ever since 1903 the Railroad Company had been refusing to make any such sales of its said lands. It further appears that it was contended by the Railroad Company that such applications were made by persons who desired to obtain title on account of the timber, and not otherwise, and for the purpose of speculation only, and not in good faith as actual settlers, and that the lands were chiefly, and in most instances solely, of value because of the timber thereon, and were not fit for actual settlement.

This Court was of the opinion that it was clear that such lands as were fit for cultivation were more valuable for the timber which was upon them.

For these reasons evidently, this Court concluded that an injunction merely *against future violations of the covenants* would not afford the measure of relief to which the facts of the case entitled the Government, and that under the circumstances just described, Congress might desire to relax the restrictions of the granting acts and to permit the Railroad Company to sell to persons other than actual settlers, and, perhaps, to sell the timber lands in larger quantities than one hundred and sixty acres to one person.

Consequently this Court said:

"We think therefore that the Railroad Company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legis-

lation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads."

The obvious meaning of the foregoing language seems to be that the Railroad Company should be enjoined from any disposition" of the grant lands "whatever" as well as "from any disposition * * * of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition" *by the Railroad Company* "in accordance with such policy as" Congress "may deem fitting under the circumstances," and at the same time secure to the *Railroad Company* "all the value the granting acts conferred upon the railroad."

The Government makes the astounding contention, however, that by said language, this Court intended to authorize Congress to provide by legislation for the "disposition" by the United States, instead of by the Railroad Company, of the aforesaid lands to which the Railroad Company has "a complete and absolute grant" * * * "with power to sell, limited only as prescribed," as well as with power to "choose the actual settler," and to "sell for any price not exceeding \$2.50 an acre," and to "sell in quantities of 40, 60, or 100, or any amount not exceeding 160 acres," and to "choose the time for selling or its use of the grants as a means of credit."

The mere statement of this contention would seem to furnish its own refutation.

As some of the grant lands are fit for settlement and cultivation and as other parts thereof are so heavily covered with valuable timber that they are unfit for cultivation, and as still other parts thereof are less heavily covered with timber, and, while fit for cultivation, are more valuable for the timber thereon, and as the Railroad Company is required to pay local

County and State taxes upon all of the patented lands, and as it is the undoubted policy of the Government to have these enormous holdings of lands and the timber and minerals thereon, put to the highest use possible by as large a number of its citizens as practicable, at as early a time as practicable, it might well have been expected by this Court that Congress would desire to add to, alter, or amend the granting acts in so far as relates to the disposition of these lands by the Railroad Company, and particularly to relax the restrictions of the grant in regard to the sale of the heavily timbered land to actual settlers only or in tracts of not to exceed 160 acres, as well as in regard to the maximum price of \$2.50 per acre. Obviously, it would be to the advantage of both the public and the Railroad Company to have certain changes made in the terms of the restrictions in the granting acts. Some changes might be desired which could only be made with the consent of the Railroad Company.

As a matter of public policy Congress might desire to alter or amend the granting acts by removing or relaxing some of the restrictions upon the sale of the lands by the Railroad Company. This could undoubtedly be done without any formal consent by the latter.

Perhaps Congress possesses power to alter or amend the granting acts so as *to require or compel* the Railroad Company to permit settlers to go upon such lands as are fit for cultivation, and to sell not more than 160 acres to any such settler, and to fix the period of settlement which shall entitle such settler to purchase such lands. Perhaps such amendatory legislation could give such settler the right to maintain suit in the proper Federal Court to enforce the right of purchase thus acquired by him.

It is entirely clear that Congress does have power to add to, alter, or amend the granting acts in any way that does not impair the substantial vested rights of the Railroad Company in the granted lands, as defined by

this Court in its opinion and judgment on the former appeal. It seems equally clear that by its aforesaid language this Court intended to have the *status quo* of the grant lands preserved for a reasonable length of time to afford Congress an opportunity to enact such legislation only.

In the case of *Union Pacific R. R. Co. v. United States* (9 Otto, 700) this Court said:

“No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.”

In the same case this Court, in referring to the power of Congress reserved in a granting act to add to, alter, amend, or repeal the same, said:

“That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this Court, through Mr. Justice Clifford, in *Miller v. The State* (15 Wall. 498):

‘It may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets; and, again, in *Holyoke v. Lyman* (15 Wall. 519), To protect the rights of the public and of the corporators or to promote the due administration of the affairs of the corporation.’ ”

In *Shields v. Ohio* (95 U. S. 324), the Court said:

“The power of alteration and amendment is not without limit. The alterations must be reasonable;

they must be made in good faith; they must be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of reserved powers, the *vested rights of property* of corporations, in such cases, are surrounded by the same restriction, and are as inviolable as in other cases.

In the leading case of *The Commonwealth v. The Essex Company* (13 Gray, 239), Chief Justice Shaw expresses the rule in apt language as follows:

“The rule to be extracted is this, that when under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.”

The same principle is expressed in many different forms in an innumerable number of cases.

In the case at bar the Government brought suit to secure a forfeiture of the grant of lands which was acquired by the Oregon & California Railroad Company, and also to recover the excess amount of money which had been received by said Railroad Company from the sale of some of its grant lands contrary to the restrictive covenants of the grant. The trial court decreed the forfeiture but denied the right of the Government to recover from the Railroad Company such excess money. This Court reversed the judgment of the trial court, but it expressed no opinion and gave no direction to the trial court in regard to its denial of the right of the Government to recover such excess money.

The Chamberlain-Ferris act proceeds upon the theory that “all the value the granting acts conferred upon the Railroad” was the right to receive the gross sum of \$2.50 per acre for the total number of acres of land contained in the grants, and that it had no vested

rights in the grant which could not be ignored, repudiated, or taken away from it by the Government through legislative action, provided only that it was secured in its right to receive that total and gross amount of money at some time in the future, which the Government might consider reasonable; and that no allowance need be made for the expense of administering the grant or for taxes paid to the counties and State by the Railroad Company.

The right to exercise dominion over the land, and to choose the settlers, and to sell for less than \$2.50 per acre, and in any quantities less than 160 acres, and to choose the time for selling, and to use the grant as a means of credit, are all discarded as of no value, or as being fully compensated for by the maximum price of \$2.50 per acre to be paid in the manner specified in the act.

POWER OF EMINENT DOMAIN.

It is contended by the Government that the Chamberlain-Ferris Act is sustainable upon the theory that in so far as it takes the land and property of the Railroad Company it is an exercise by the Government of the power of eminent domain. This contention will hardly stand analysis. The argument that the land is taken for a public use because the original purpose of the grant was to secure the settlement of that part of the country, and because the proceeds of the sales of the land "are to go to purposes undoubtedly public", is rather attenuated, to say the least.

The avowed purpose of the Government is to *resell* the land to *private parties*. It is difficult to understand by what process of reasoning the conclusion can be reached that the *land* is thus to be devoted to a *public use*, merely because the proceeds from its sale are to be applied to public purposes. The fact that a part of the

proceeds is to be put in an "irreducible school fund", and that another part of it is to be expended for common schools, roads, highways, bridges, and port districts, and that another part of it is to be expended for reclamation purposes, and that only ten per cent. of it is to be put in the "general fund of the Treasury", *may serve to make the law popular*; but it can hardly be said to relate back and make *the sale of the lands to private parties* a public use. If *all of the proceeds* were to be put in the "general fund of the Treasury", it could just as well be argued that the exercise of the power of eminent domain by the Government was justifiable, upon the same theory.

The argument that the land is to be devoted to a public use, because it is to be resold by the Government in many parcels to many private persons, and because the policy of the Government to secure the settlement of the country will thus be advanced, is equally unsound. In the first place, it is admitted by the Government that a large part of the land is covered with timber and will be unfit for cultivation or settlement for many years to come. The Chamberlain-Ferris Act recognizes this fact and provides *for the sale of the timber exclusive of the land*. Indeed, the terms of the act are calculated, and seem intended to enable the Government, to sell all the timber that is on the lands at the best prices obtainable; and it was contended by the Government on the former appeal of this case that the value of these lands is about twenty-five million dollars in excess of the amount of \$2.50 per acre which the railroad company is entitled to receive, and that this enormous excess value arises largely and almost entirely from the timber thereon.

It is axiomatic that if the Government desires to take this land under its power of eminent domain it can do so only for a public use and only by paying just compensation for the same.

This Court has frequently decided what constitutes a public use in this sense. It is contended by the Government that the case at bar falls within the principles laid down by this Court in the case of the *United States v. Gettysburg Electric Railway Co.* (160 U. S. 668), because in that case this Court said:

“When the legislature has declared the use or purpose to be a public one, its judgment will be respected by the Courts, unless the use be palpably without reasonable foundation.”

Referring to the case at bar counsel for the Government say:

“There was no formal declaration here that the purpose was public, but that, we apprehend, is not necessary when its character is evident, as in this case.”

In this particular it is conceded that counsel for the Government are correct. The Chamberlain-Ferris Act contains no declaration that the purpose is public. Moreover, “its character is evident.” It seeks to take the land of the Railroad Company for the purpose of permitting the Government to sell the timber from it *to private parties* at an enormous profit, as well as to resell the land *to private parties for private use*.

FIXING OF JUST COMPENSATION IS A JUDICIAL AND NOT A LEGISLATIVE FUNCTION.

In the Chamberlain-Ferris Act Congress has assumed to fix the amount of compensation which ought to be paid to the Railroad Company for its lands. In the case of *Monongahela Navigation Co. v. United States*, (148 U. S. 312), this Court said:

“The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the Government, is of importance, for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government. * * *

“By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a *judicial* and *not* a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, *then the question of compensation is judicial*. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, *or even what shall be the rule of compensation*. The constitution has declared that just compensation shall be paid, and *the ascertainment of that is a judicial inquiry*.

RULE FOR MEASURING JUST COMPENSATION.

In the case at bar Congress has undertaken to determine not only “what compensation shall be paid” to the Railroad Company, but also, “what shall be the rule of compensation.” It has undertaken to apply as the proper rule of compensation the provisos in the granting acts that the lands should not be sold by the Railroad Company at a price in excess of the sum of \$2.50 per acre. But, obviously, this is not the proper rule of compensation to be applied, if the Chamberlain-

Ferris Act can be sustained only upon the theory that it constitutes an exercise of the power of eminent domain on the part of the Government, because in that event the maximum selling price fixed by the granting acts is certainly not conclusive on the question.

In the case of *Mississippi and Rum River Boom Co. v. Patterson* (98 U. S. 206), this Court held:

“That in determining the value of land appropriated for public purposes, the inquiry must be: What is the property worth in the market, from its availability for valuable uses, both now and in the future?”

In that case this Court said:

“In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property as between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with references to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.”

And in the same case this Court quoted with approval the statement of the Supreme Court of New York:

“That neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry

was, what is the value of the property for the most advantageous uses to which it may be applied?"

In this connection it is important to observe that in the case of the *Monongahela Navigation Company v. United States* (*supra*), this Court said:

"The language used in the fifth amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right of power in the Government; the last (the one in point here) being: 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation of compensatory damages, as distinguished from punitive or exemplary damages; the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that, if the adjective 'just' had been omitted and the provision was simply that property should not be taken without compensation, a natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken; and this just compensation, it will be noticed, is *for the property*, and *not to the owner*. Every other clause in this fifth amendment is personal. 'No person shall be held to answer for a capital or otherwise infamous crime' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken. This excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it

to stand as a declaration that no private property shall be appropriated for public uses *unless a full and exact equivalent for it be returned to the owner.*"

In the case at bar it is admitted by the Government that the value of the property which is taken from the Oregon & California Railroad Company by the Government under the Chamberlain-Ferris Act is approximately \$30,000,000, and that the amount to be paid or credited to the Railroad Company is substantially less than \$6,000,000. Hence it can hardly be said that under this act, "a full and exact equivalent" for the land taken is "to be returned to the owner."

Even if it is conceded, however, for the purpose of the argument that the Oregon & California Railroad Company will receive a full and exact equivalent, or, in other words, just compensation, under the Chamberlain-Ferris Act for the lands taken from it, then, nevertheless, it is true that the act in question is invalid and constitutes a dangerous precedent as an insidious invasion of the rights of private property which are guaranteed by the Constitution, by substituting legislative for judicial action, and thus depriving the party of the right to a hearing before the judgment is pronounced. Speaking for this Court, in *Boyd v. United States* (116 U. S. 616), Mr. Justice Bradley appropriately said:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it con-

sisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obesta principis.*"

Respectfully submitted,

FRANCIS J. HENEY,
Amicus Curia.

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Supreme Court of the United States

October Term, 1916

OREGON & CALIFORNIA RAILROAD COMPANY, *Plaintiff*
vs.
Defendant

UNITED STATES OF AMERICA

BRIEF FOR UNION TRUST COMPANY OF
NEW YORK, DEFENDANT AND
APPELLANT

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IN THE
Supreme Court of the United States,

OCTOBER TERM, 1916.

OREGON & CALIFORNIA RAILROAD COM-
PANY, a corporation, *et al.*,
Defendants and Appellants,

against

UNITED STATES OF AMERICA,
Appellee.

**BRIEF FOR THE UNION TRUST COM-
PANY OF NEW YORK, DEFEND-
ANT AND APPELLANT.**

STATEMENT.

From the decree of the District Court of the United States for the District of Oregon, entered upon the mandate of this Court which issued after the decision of this suit (reported 238 U. S. 393-

439), an appeal was taken by the defendants to the United States Circuit Court of Appeals for the Ninth Circuit, which, under Section 239 of the Judicial Code, has certified seven questions or propositions of law to this Court. This Court has ordered that the whole record and cause be sent up to it for its consideration, and the whole matter therefore is now here for decision in the same manner as if it had been brought up for review by writ of error or appeal.

Since the decree was entered an Act of Congress, commonly known as the Ferris Act, has been passed (approved June 9, 1916), which the Attorney General contends (and we concede) will, if held valid, render "moot every specific question presented by the certificate save the question of costs". (See Motion to advance the cause, p. 12).

We shall therefore urge not only that the decree is not according to the decision of this Court or the law, but also that the said Act of Congress is invalid.

LAND GRANT.

To aid in the construction of a railroad the Congress, by Acts of July 25, 1866 (14 Statutes at Large, p. 239), and May 4, 1870 (16 Statutes at Large, p. 94), made grants of public lands in the State of Oregon. By a clause in an Act approved April 10, 1869 (16 Statutes at Large, p. 47), which amended the said Act of 1866 by enlarging the time for beginning the work of construction, it was provided: "That the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not greater than one-quarter section to one purchaser and for a

price not exceeding two dollars and fifty cents per acre." A clause in the Act of 1870 provided that the granted lands "shall be sold by the Company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre." The predecessor of the defendant Oregon & California Railroad Company accepted the grants, built a railroad in accordance with its terms, and obtained patents to most of the lands thus granted.

MORTGAGE TO DEFENDANT UNION TRUST COMPANY.

Very little of the granted lands were sold in the early days (238 U. S. at p. 408) and the Railroad got into financial difficulties (238 U. S. at pp. 407, 435; Stipulation, Record Vol. 4, p. 1564). In 1887 it mortgaged all the lands covered by the grants (together with its railroad, etc.) to the defendant Union Trust Company, as Trustee for bondholders (Ex. H, Record, Vol. 1, p. 197), the money thus obtained being used to continue the construction of the railroad and to redeem bonds which had theretofore been issued to raise funds for construction purposes. (Stipulation, Record, Vol. 4, p. 1575.) Many of these bonds were negotiated and are now held abroad, especially in Holland and Germany (Stipulation, Record Vol. 4, pp. 1574-5).

SALE OF LANDS.

After a while some of the granted lands were sold in larger quantities and for higher prices than were specified in the granting acts (238 U. S. at p.

408). This was done with the knowledge of, and without any objection by, the Government of the United States (238 U. S. at p. 410). The timber on these lands finally became valuable, and, as a result, many persons sought to obtain the lands not for settlement but for the profits to be derived from the sale of the timber. (238 U. S. at p. 438, Record Vol. IV, pp. 2014-5; Vol. VI, 2774.)

SUIT BY THE UNITED STATES FOR A FORFEITURE.

The attempts of individuals to get possession of the valuable timber for a nominal price were insignificant compared with the attempt of the Government to obtain the lands without paying anything whatever. The suit which it brought was based upon the claim that, because of the sale of some of the lands contrary to the provisos above referred to, the lands had become forfeited to it. It prayed, therefore, that the court would declare that these lands belonged to it or, if that relief were denied, that a receiver should be appointed to sell the lands in accordance with the provisos or that the Railroad should be directed to make the sales, etc., etc. (Record, Vol. I, p. 78-80). This court decided (we submit) that the grant to the railroads could not be forfeited, that the provisos were covenants, not conditions, and that they should be construed literally; and (since the provisos as thus interpreted were harsh in their operation), it enjoined any disposition of the lands or timber until Congress should have a reasonable time in which to pass appropriate legislation.

DECREE UPON THE MANDATE.

It having been thus decided that the lands belonged to the Railroad and were not forfeited to the Government, the Government proposed the decree which was entered by the District Court (Certificate of U. S. Cir. Ct. of Appeals, pp. 13-16), which decree, in effect, prevents the Railroad *forever* from using the lands and deprives it *forever* of the right to cut the timber growing upon the lands.

LEGISLATION BY CONGRESS.

Although the Government had thus obtained the entry of a decree which, if valid, destroyed much of the value of the lands in the hands of the Railroad and, although an appeal was pending from this decree, the Congress proceeded to enact legislation, intended to transfer to itself the title and all control of the lands and to enable the Government to sell, *first the timber and afterwards the lands*. The Ferris Act, which was approved June 9, 1916, stated, among other recitals, that this court had in this suit ordered that the Railroad be enjoined "from making further sales of *lands* in violation of the law" and further enjoined from "making any sales whatever of either the *lands or the timber* thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands, etc.," and enacted that the title of all the lands be "revested in the United States" (Sec. 1); that they be divided into three classes: power sites, timber lands, and agricultural lands (Sec. 2); that the timber should be sold by the Secretary of the Interior at such

times and in such manner as might seem best, and that the lands from which it was removed should thereafter be classed as agricultural lands (Sec. 4); that the lands classed as agricultural should be subject to entry under the homestead laws but that patents should not issue until the lands had been cultivated for three years (Sec. 5); that the proceeds of the timber and the lands should be deposited in the Treasury of the United States and be paid to the Railroad or the lien holders as the fund accumulated, and, that *at the end of ten years, an appropriation* should be made from the general funds of the Treasury of the United States to pay any balance which might be due to the Railroad (Sec. 10); that the profits derived from the transaction should be paid one-quarter to the State of Oregon, and one-quarter to the counties where the lands were situated, while one-half should be retained by the Government (Sec. 10).

[The Act referred to is quoted in full in Exhibit "A", annexed to this brief at pp. 75-88.]

ASSIGNMENTS OF ERROR.

The assignments of error of the Union Trust Company, twenty-eight in number, are printed in full in the Certificate of the United States Circuit Court of Appeals to this court at pages 52 to 62. It seems unnecessary to set forth all of these assignments in this place, but we print below certain of the assignments with a reference by number to other assignments which present substantially the same points.

(As we have said above, the decree entered in the District Court does not raise moot questions, since the Act of June 9, 1916, is invalid.)

"23. The Court erred in not making and entering a decree herein responsive to the mandate of the Supreme Court of the United States, without modification or enlargement, and in the terms of the opinion to which the said mandate referred, and which was expressive of the mandate itself."

(See also assignments numbered 1 to 4 and 22).

"8. The Court erred in its said decree in incorporating into and making part of the general injunction therein injunctive matter touching the sale of the timber on said lands, except as a part of and in conjunction with the land on which the timber stands; and touching the cutting or removal, or the authorizing of the cutting or removal, of any of the timber thereon, except in connection with the sale of the land bearing such timber; likewise touching the sale of any mineral or other deposits in said lands, except as part of and in conjunction with the land in which the mineral or other deposits are found; and also touching the removal or the authorizing of the removal of mineral or other deposits in said land, except in connection with the sale of the land containing such mineral or other deposits."

(See also assignments numbered 5 to 7).

"15. The Court erred in not holding and decreeing that the railroad company, so long as the granted lands were not sold by it but remained unalienated, had a complete and absolute title thereto, and under such circumstances, and as the owner of such a title, had the right to sell, cut, remove, or authorize the

cutting or removal of the timber thereon; and the Court erred similarly in not so holding and decreeing with reference to any mineral or other deposits in or products out of said lands—subject to such qualification as may arise from the limited injunction referable to the period of six months, as expressed in the opinion of the Supreme Court.”

(See also assignments numbered 16 to 21).

“24. The Court erred in adjudging and decreeing that the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, or from any or either of them, any costs or disbursements herein, and in adjudging and decreeing that execution issue against the said defendants or any or either of them, for any costs or disbursements herein.”

(See also assignments numbered 26 and 27).

ARGUMENT.

Position of the Defendant Union Trust Company, as Trustee of the Mortgage.

It is at least probable that the Railroad could not have been built if the land grant had not been mortgaged. At any rate, it has been settled in this case that the use of the lands to obtain credit was contemplated and that the mortgage to the Union Trust Company (instead of being a cause for forfeiture as claimed by the Government) was

within the powers of the Railroad and valid, although the interest of the mortgagee was subject, like that of the Railroad itself, to the "restrictions imposed" upon sales by the provision on that subject contained in the granting acts. Thus the Union Trust Company, as Trustee of the mortgage, has a prior claim or first lien upon the lands and their proceeds and it acts under a valid mortgage in a trust capacity for the bondholders who partly upon the security of these lands contributed their money to build the railroad.

To these bondholders, many of whom live in Holland and Germany, the Union Trust Company is accountable. Its position is in very large part the same as that of the defendant railroad, for any decision establishing that the railroad has valuable rights in these lands will be directly for its benefit; but it contends, *in addition and especially*, that even if it is possible for the Government now to take away rights once conveyed to the railroad, *it cannot take them except subject to the lien of the mortgage.*

A list of the points urged by the mortgagee is set forth in the "Subject Index", prefixed to this Brief.

POINT I.

**The Act of Congress of June 9, 1916,
is invalid.**

A.

The act of June 9, 1916, is not within the powers given to the Congress by the Constitution.

1. The relation between the Government and the Railroad in reference to these lands is contractual.

As this Court said in *Davis v. Gray*, 83 U. S. 203, at p. 232:

“That the act of incorporation and the *land grant* here in question were *contracts* is too well settled in this court to require discussion.” (Italics ours.)

See also *Fletcher v. Peck*, 6 Cranch. 87, at p. 137.

New Jersey v. Wilson, 7 Cranch. 164, at p. 166.

Dartmouth College v. Woodward, 4 Wheat. 518 at p. 627.

State Bank v. Knoop, 16 Howard 369, at p. 380.

U. S. v. Central Pac. Ry., 118 U. S., 235, at p. 238.

In the case last cited (*U. S. v. Central Pac. Ry.*) this Court said (p. 238), referring to certain sections quoted from several land grant acts, that they “taken together constitute the contract between the United States and the appellee” (*i. e.*, Railroad) and cited *U. S. v. Union Pacific R. R.*, 91 U. S. 72, *Sinking Fund Cases*, 99 U. S. 700, 718, *Union Pacific R. R. Co. v. U. S.*, 104 U. S. 662.

2. Moreover the contract is no longer executory, it is executed (*Fletcher v. Peck*, 6 Cranch. 87, at p. 137). What the Railroad agreed to do to earn the grant has been done; what the Government sought to obtain, it has obtained; and the price agreed upon has been paid. The conveyance of the lands to the Railroad—for there can be no question that the title is in the Railroad—was not a gift but a sale;

Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 679-80,

and the terms of the granting acts which remain to be carried out should therefore be construed according to their fair meaning.

U. S. v. Minnesota & Northwestern R. R. Co., 1 Minn. 127, at p. 132.

Charles River Bridge v. Warren Bridge, 11 Peters 420, 589-90.

3. It is at least doubtful if Congress has the power to enact laws directly impairing the obligations of contracts made between citizens or between a citizen and a State. Certainly "it was never intended that Congress should exercise that tyrannical power" of impairing the obligation of contracts.

Cooley: Constitutional Law, p. 345.

Hepburn v. Griswold, 8 Wall. 603, at p. 623.

Sinking Fund Cases, 99 U. S. 700, 718.

U. S. v. Union Pacific Ry. Co., 160 U. S. 1, at pp. 33-34.

4. However this may be, where the effect of legislation by a government would be to *repudiate*

its *own* contractual obligation, or to take back property which it has conveyed for a valid consideration, such legislation would be—*on general principles*—beyond its power, unless it were an absolute despotism.

(Of course the indirect lessening of the value of a contract by general legislation is an entirely different matter—as has been pointed out by this court. *Legal Tender Cases*, 12 Wall. 457.)

Fletcher v. Peck, 6 Cranch. 87, at p. 135.

Terrett v. Taylor, 9 Cranch. 43, 50-51.

U. S. v. Minnesota & N. W. R. R. Co., 1 Minn. 127, 132-3.

Sinking Fund Cases, 99 U. S. 700, 718.

Charles River Bridge v. Warren Bridge, 11 Peters, 420, 574.

U. S. v. Central Pacific Ry. Co., 118 U. S. 235.

In the case last cited (*U. S. v. Central Pacific Railway Company*) this court, after stating (as pointed out above) that sections in certain land grant acts taken together constituted a contract between the United States and the railroad, declared (p. 238):

“This contract is binding on the United States and they cannot, without the consent of the company, change its terms by any subsequent legislation.”

In *Fletcher v. Peck*, 6 Cranch. 87, the State of Georgia granted certain lands and one year later passed an act revoking the grant. Marshall, C. J., said (p. 135):

“Is the power of the legislature competent to the annihilation of such title and to a re-

sumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power.

* * * When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? * * *

In *Terrett v. Taylor*. 9 Cranch. 43, Story, J. said (pp. 50-51, 52):

“If the legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principal which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their

property legally acquired. * * * But that the legislature can repeal statutes creating private corporations, or confirming to their property already acquired under the faith of previous laws, and by such appeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

In *U. S. v. Minnesota & N. W. R. R. Co.*, 1 Minn. 127, the court said (pp. 131, 132):

"An interest in or right to lands, franchises, etc. once vested cannot be divested by any act of the grantor, unless by agreement of the parties to the grant.

Every grant of a franchise (says Judge Story) is necessarily exclusive, so far as the grant extends, and cannot be resumed or interfered with. The Legislature cannot recall its grant nor destroy it. In this respect, the grant of a franchise does not differ from the grant of lands. In each case the particular franchise or particular land is withdrawn from legislative operation, and the subject matter has passed from the hands of the government."

* * * * *

"But, independent of the Constitutional provision referred to, the Repealing Act is invalid. There is a principle inherent in the nature of society, as old as civil government itself, which sets bounds to the powers of legislation. It is the principle which protects the life, liberty and property of the citizen

from violation in the unjust exercise of legislative powers."

In the *Sinking Fund Cases*, 99 U. S. 700, it was said (p. 719):

"The United States are as much bound by their contracts as individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. *No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation.* All this is indisputable." (Italics ours.)

The above extract was quoted with approval in *U. S. v. Union Pac. Ry. Co.*, 160 U. S. 1, 34.

In *Charles River Bridge v. Warren Bridge*, 11 Peters 420, it was said (p. 575):

"The principle is admitted that the grantor can do nothing that shall destroy his deed; and this rule applies as well to the state as to an individual. And the same principle operates with equal force on all grants, whether made by the state or individuals."

5. In this country all governmental power is not vested in Congress. Our plan of government is based upon the conception that Congress shall make laws of a general character and also may make contracts, while to the courts is entrusted the duty of passing upon the rights of parties under the laws thus passed and the contracts thus made. It has never been contemplated that Congress might decide its own rights under a contract by passing such an act as should properly

be embodied in the decree of a court; and certainly it cannot be tolerated that Congress, after referring to the court the question of its rights under the contract in question and after obtaining a decision, should pass an act in effect overruling that decision.

The rule is stated by an eminent authority as follows:

“The legislature makes the laws, but cannot pass judgments or decrees or make a law that is such in substance.”

Cooley: Constitutional Law, p. 350.

Yet that is precisely what has happened in this case. This Court has rendered its decision declining to forfeit the granted land because, as there had been no violation of a condition subsequent, the lands could not legally be forfeited; and thereupon, the Congress has nevertheless passed an Act declaring that the lands are forfeited!

If the course adopted in reference to these lands is available in this case, it can be followed in all controversies to which the Government is a party. If a decree of this Court should be satisfactory, it may be allowed to stand; but if not, it will only remain for the Congress to pass an act reversing the decision of this Court and in effect directing such judgment as it has desired.

In *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226, referring to a statute which would transfer certain property from one person to another, this Court said (pp. 235-6):

“Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers

of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—*an act of spoliation*. Due protection of the rights of property has been regarded as a vital principle of republican institutions.” (Italics ours.)

6. The power of the Congress to pass laws is limited. Its action is confined to the express powers given it by the Constitution and to such incidental powers as may be implied from those expressly given. The Act of June 9, 1916, cannot be brought within the scope of any of the express or implied powers of Congress. Certainly this legislation cannot be upheld under Article IV, Sec. 3, clause 2 of the Constitution giving Congress power to make “regulations respecting the territory or other property of the United States.” To be sure these lands were *once* a part of the public domain, but long ago they were conveyed to the Railroad for a valuable consideration and title to these lands in the Railroad is now absolute as this Court has held (238 U. S. 393, 434). It follows that Congress has no more power to legislate concerning these lands, or to confiscate them, than it would have in the case of any other lands wherever situated.

Wilcox v. Jackson, 13 Peters, 498, 517.

In *U. S. v. Minnesota & N. W. R. R. Co.* (1 Minn. 127), the court said (p. 133):

“The government of the United States is one of limited powers. It is only sovereign

in a qualified sense. Congress can do what the Constitution authorizes it to do, and no more. Certain powers undoubtedly arise by implication, but no power can be implied authorizing the Legislative department to take a man's property without compensation and without due course of law. This power is not included in any general grant of legislative powers. A power to do an act which has been regarded as dishonest among individuals from time immemorial in all civilized countries, cannot be implied from any of the powers granted by the Constitution; and, as such a power is not expressly given, it cannot be exercised."

B.

The Act of June 9, 1916, is in violation of the Fifth Amendment of the Constitution.

1. Except perhaps for the sake of emphasis it is unnecessary to argue (as in "A" above), that the Act in question is beyond the powers conferred upon the Congress; for the Congress is expressly *prohibited* from passing such an Act by the Fifth Amendment to the Constitution which provides that "no person * * * shall be deprived of life, liberty, or property without due process of law."

Under this point we plan to discuss the effect of this prohibition upon the attempt of the Government to take back to itself the *lands* which have been paid for by, and conveyed to, the Railroad, and which have been mortgaged to the Union Trust Company. In the following point (Point III, *infra*), we shall refer to the effect of this prohibition on the attempt to take from the Union Trust

Company its *vested rights under the said mortgage*.

2. That the lands in question belong to the Railroad cannot be disputed, and that the Government is seeking to take them away, by legislative enactment, appears expressly from the terms of the Act itself. Certainly the lands are property, and there is no distinction in principle between the taking back of lands once owned by the United States and the taking of lands derived from some other source—except that the former seems the greater offense. While the citation of authorities is, therefore, unnecessary, we point to a few decisions against the power of Congress to seize property the title to which has vested in its grantees.

Sinking Fund Cases, 99 U. S. 700.

Davidson v. New Orleans, 96 U. S. 97, 102.

United States v. Central Pacific Ry., 118 U. S. 235.

United States v. Minnesota & N. W. R. R. Co., 1 Minn., 127.

In the *Sinking Fund Cases* (99 U. S. 700), where the question arose as to the power of the Congress to direct the deposit of certain funds which were to become due from the Union Pacific Railroad Company in the Treasury of the United States to secure the payment of subsidy bonds issued by the United States in aid of the railroad, this Court said (pp. 718-9) :

“The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional pro-

hibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection."

In *Davidson v. New Orleans*, above cited (96 U. S. 97,), it was said (at p. 102) that

"a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

3. By the strict and harsh terms of the granting acts the railroad could not sell the lands to any one other than actual settler, nor could it sell in quantities exceeding 160 acres nor for a price greater than \$2.50 an acre. But its title was *absolute* and, except for the above qualifications, *it had every incident of ownership*. This court in its opinion in this case referred to "the Government's admission that there was no obligation imposed upon the railroad to sell" (238 U. S. at p. 418), and later (pp. 434-5), defined the rights of the railroad as follows:

"There was a complete and absolute grant to the railroad company with power to sell,

limited only as prescribed, and we agree with the Government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre, might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.' And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed."

4. Under the Act of June 9, 1916, if valid, not only is the title to the lands taken away from the Railroad; but it is deprived of the right to choose the actual settlers, the right to decide what quantity it will sell, and the right to decide the price for which it will sell. Moreover, it is deprived of the right to choose the time for selling, and *is cut off from all opportunity to use the lands as a basis of credit.*

The effect of the Act in question might therefore be summarized as follows:

WHEREAS, in a suit to which the United States was a party it has been adjudged that the title of the Railroad to these lands is absolute, that it may use them as a basis of credit, that the only restriction upon the Railroad is contained in the covenant relating to sales, that, limited only by the terms of that covenant, the Railroad may choose the actual settlers to whom it will sell, the amounts of land which it will sell, the price it will ask, and the times for selling;

Be it enacted (*i. e.*, adjudged and decreed?) that the title of the Railroad is not absolute and is hereby transferred to the United States; that it cannot, therefore, be used as a basis of credit; that the covenant as to sales shall not be carried out; that such sales as shall be made shall be to

settlers chosen by the government, at prices fixed by it and at such times as it shall select.

5. The loss of the ability of the Railroad to use these lands as a basis of credit in consequence of this seizure by the Government is a point of importance. The right to mortgage the lands was passed upon by this court which said (238 U. S. pp. 434-5) as stated above: "It might choose the time for selling or *its use of the grants as a means of credit.* * * * To use the grant for credit might become, indeed did become, a necessity." It may become necessary or at least expedient for the Railroad to raise further funds, or to raise funds for the retirement of the mortgage now in force, by mortgaging these granted lands—a course from which it is cut off by the Act in question.

6. It would seem to be the theory of the Act in question—so far as it is based on any theory—that the Railroad has only the bare legal title to these lands, that the restrictive covenant is the only clause of the granting act which confers anything at all upon the Railroad, and that the said covenant gives the Railroad only a power of sale without beneficial interest.

We have tried to point out above that since the title is vested in the railroad it cannot be taken away by *legislative act*; and further, that from the plain meaning of the granting acts, as well as the decision of this court, it appears that there is vested in the railroad not only ownership of the lands (for which it has paid a full price) but every incident of ownership—save as modified by the covenant as to sales.

7. It is not to be supposed that the granting act contemplated an immediate sale of the granted lands. As soon as the title to the lands passed to the railroad they became subject to taxation by the State and Local authorities (*U. S. v. Minn. & N. W. R. R.*, 1 Minn. 127); and they became a cause of other expenses and a source of care and responsibility to the railroad. Having thus all the *burdens* of complete ownership, the railroad is, of course, entitled to all the *benefits* of such ownership—except as these may be expressly and clearly cut down by the covenant as to sales. What these benefits may be, need not be defined, for that there are benefits of ownership may be assumed. Without referring now to the right to cut the timber (which will be taken up below—see Point II) the railroad would have the right so long as the lands remained unsold to take ice in winter and fish and game in summer, to use the lands for pasturage and to raise crops, to take such timber and stone as might be needed for the construction or maintenance of the railroad, to build buildings upon the land, to lease the land as well as buildings, etc. Certainly there is a vast difference and a vital distinction between the ownership of the land with the rights incident to such ownership and a bare power to receive the proceeds of the sales of the lands when disposed of by another in his discretion.

8. Moreover, while by the terms of the granting acts the railroad did not receive any mineral lands, it did receive such lands as contained *coal* and *iron*. Deposits of coal and iron were not intended for the use of “actual settlers” (*i. e.*, agriculturists) and the paramount purpose of these

grants was to aid the railroad. The deposits of coal and iron, therefore, belong to the railroad and cannot be taken from it by the Act in question—which provides for the entry of mineral lands not under the homestead laws but under the mineral laws of the United States.

9. The claim should not be made that an Act of Congress declaring that property which has belonged to a citizen shall thereafter belong to the United States is “due process of law” as used in the Constitution. This provision has come down to us from Magna Charta and has always been construed to mean the *law of the land* as determined by a court of competent jurisdiction.

Murray v. Hoboken Land Co., 18 Howard 272;

Davidson v. New Orleans, 96 U. S. 97, 101;
Mr. Webster in *Dartmouth College Case*, 4 Wheat. 518 at p. 581.

A clear statement of the law is contained in the dissenting opinion of Mr. Justice Strong in the *Sinking Fund Cases* (99 U. S. at p. 737), as follows:

“What is due process of law is well understood. It is law in regular course of administration through courts of justice. Coke, 2 Inst. 272; *Murray's Lessee v. The Hoboken Land and Improvement Co.*, 18 How. 272. ‘The terms “the law of the land”, said Chief Justice Ruffin (*Hoke v. Harderson*, 4 Dev. (N. C.) 1), do not mean merely an act of the General Assembly. If they did, every restriction upon legislative authority would be at once abrogated, and private property would be at the mercy of the legislature.’ p. 15.”

Here, of course, there has been no semblance of a "due process of law" under which the title to these lands has been taken away from the railroad and the mortgagee. In fact the most striking feature of this case is that although there has been "due process of law", yet under that "process" it has been determined by this Court that the government is *not* entitled to seize these lands.

C.

The Act of June 9, 1916, is unconstitutional because it cancels the lien of the mortgage to the Union Trust Company, as trustee for bondholders, and takes away its vested rights as trustee under said mortgage.

1. We have urged in the preceding point that, because of the Fifth Amendment to the Constitution, the *railroad* cannot be divested of ownership in the granted lands. But whatever theory may be advanced in support of a claim by the Government that the lands may be taken *from the railroad*, it cannot meet our contention that the railroad, having the unquestioned power to do so, has, *by its mortgage*, for a valuable consideration, conveyed to the Union Trust Company, *as trustee for bondholders*, certain *vested rights* which are now sought to be, but which cannot be, divested by the Act in question.

Surely it will not be claimed that the lands conveyed by the railroad many years ago to "actual settlers", in *strict compliance with the provisions of the granting acts*, can now be seized by the Government. The rights conveyed to the mortgagee

by the mortgage which the railroad had power to make are just as inviolable.

2. The principal purpose of the Government in making the land grants was to obtain the construction of a railroad and an essential part of that purpose was the giving of aid to the railroad. It has been decided accordingly, in this very case, that the railroad had power to mortgage these lands. Moreover this court has pointed out that the use of the grant for credit became actually necessary. It said (238 U. S. at pp. 434-435):—

“It (*i. e.* the railroad) might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say ‘restrictions imposed’ to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos.”

“To use the grant for credit might become, indeed did become, a necessity. The construction of the road halted for funds. They were raised by trust deeds, as we have seen.”

3. The mortgage to the Union Trust Company dated July 1, 1887, (Exhibit H, I Transcript of Record 197) is unquestionably valid. (Stipulation as to Facts, IV Transcript of Record Items 16-18, pp. 1573-4). The bonds issued under it were used in large part to retire the bonds issued under earlier mortgages for the construction of the railroad and to provide additional funds for the completion of the railroad. There are \$17,745,000 in amount of these bonds still outstanding. Most of the bonds were negotiated abroad and are now owned abroad, especially in Holland and Germany.

(Stipulation as to Facts IV Transcript of Record, Items 19, 20, 21).

4. It may be claimed that, even if the security of the lands is taken away, the bondholders will eventually be paid in full because of the value of the other property of the Oregon & California Railroad Company or because of the guarantee of the Southern Pacific Company. However plausible this conjecture may seem, the fact remains that the Congress has no power to deprive the bondholders of the security for which they bargained, and to substitute another security which may be, in its judgment, equally good.

Certainly if the business of railroads generally, or that of these defendant railroads in particular, should become unprofitable, the bondholders would not be able to collect their indebtedness without resorting to the land grants.

5. The fact that the railroad owned the lands would not, of course, be sufficient to enable it to raise money on its mere promise to pay. To raise funds for such an enterprise, it was necessary to pledge the lands themselves—to substitute, so to speak, the *obligation of the lands* to make repayment (in addition to the promise of the railroad), in place of the *obligation of the Railroad Company*. But mortgages invariably contain, and must necessarily contain, the grant of power to the mortgagee to make the security available in case of default in the payment of principal or interest. Moreover in the mortgage of large tracts of land like these there must be provisions preventing the sale of the lands except at prices satisfactory to the mortgagee, and insuring the deposit of the funds thus

realized with the mortgagee as a preliminary to the release of its lien. Except with such terms a mortgage could not be made.

6. The mortgage to the Union Trust Company, therefore, conferred upon it the usual rights as follows:

- (a) A lien upon the lands.
- (b) The Right upon default etc. to take possession of the security.
- (c) The right upon default to sell the security at public auction.
- (d) The right upon default to foreclose, and (incidentally) to obtain a Receiver and to buy in the property for the bondholders.
- (e) The right to prevent private sales of lands at a sacrifice.
- (f) The right to receive the proceeds of sales before releasing its lien.

These rights then were conveyed to the mortgagee in trust for bondholders by the railroad which had power to convey them. Of course, as this Court has intimated, no right was conferred to sell on foreclosure "divested of the obligations of the provisos"; (238 U. S. at p. 435) but we urge that, subject only to the limitations contained in the provisos, the trustee has a vested right upon default to sell the mortgaged property.

7. Having noticed some of the rights secured to the bondholders by the terms of the mortgage, the effect of the Act of June 9, 1916, upon these rights should be examined.

In the first place, the *lien upon the lands* (i. e. the *obligation of the property itself* to pay in case of default) without which these bondholders would never have advanced their money to be applied to the construction of the road—although such construction was sought by the Government of the United States—is taken away.

The right of the mortgagee upon default of the Railroad, to sell the lands to a purchaser *with all the powers conferred upon the railroad* and thus to obtain *promptly* the *full value of its lien*, is destroyed.

Moreover the right of the mortgagee in case of foreclosure to buy in the lands itself and to raise funds for that purpose by a *new mortgage* upon the lands—the *ordinary practice in cases of reorganization*—is taken away. It may be suggested that this right to continue to use the lands as a basis of credit is not of very great value, in view of the present attitude of the Government; but that is not the question. The ability to mortgage these lands might determine the success or failure of a plan of reorganization favorable to the bondholders. Moreover, as a guide to the value of these lands as a basis of credit, it should be noted that in all probability the present mortgage could not have been obtained without the pledge of these lands.

8. Since the Congress cannot lawfully destroy the lien and the vested rights of the mortgagee, it is of comparatively small importance to inquire what the Act provides as a substitute for the rights which it seeks to destroy. This substitute, however, amounts only to an undertaking by the Government (of course, unenforceable),

if there should be any proceeds of the sales of these lands by it during ten years, to turn over such proceeds to the mortgagee ("lien-holder"), *provided the Railroad consents*, but otherwise in accordance with the judgment of a court after litigation between the railroad and lien-holders; while the balance which, according to the computation of the Government, may be due *at the end of ten years* is to be paid from *an appropriation by Congress* which this Act declares "shall be made therefor".

It should be noted in this connection that there is good reason to assume that very little of these lands are agricultural in character (238 U. S. at pp. 437-438). Moreover, this Act of 1916 provides that no patent is to issue to purchasers of these lands until from three to five years after entry; that some lands, whose character is undefined, shall be withdrawn from entry altogether for two years; that *only such of these lands as can be sold for \$2.50 an acre shall be thus disposed of*—thus destroying the right of the railroad (pledged to the mortgagee) to sell such lands at less prices; that the timber lands (the great bulk of the lands) are not to be disposed of until the timber has been removed, whereupon they are to be *given away*; that the Secretary of the Interior (in co-operation with the Secretary of Agriculture etc.) is to sell the timber "at such times" as in his judgment will "produce the best results", and further that the time of the timber speculator to remove the timber is not limited, but is to be fixed by the Secretary of the Interior.

Thus it will be seen that these lands are not to be sold in accordance with the contract between the Government and the railroad—a contract in

which the mortgagee has vested rights. Lands which the railroad might wish to have peopled by actual settlers at once, the Government may never open for settlement; lands which the railroad might be willing to sell for \$1.00 an acre to settlers of its own choosing, the Government will sell *only* for \$2.50 an acre; timber lands, which the railroad might wish to sell for \$2.50 an acre the Government proposes to give away. Above all the proceeds of sales which, *under the mortgage* have to pass into the hands of the mortgagee before the lien of the mortgagee is required to be released, are to go under this Act into the Treasury of the United States *free from any lien whatever*.

Still further, there can be little doubt but that the right of the mortgagee to receive anything of importance in satisfaction of its lien upon these lands is likely to amount only to the privilege of urging upon *the Congress of ten years hence*, its moral obligation to make some sort of an appropriation for the mortgagee's benefit upon the lines suggested in the Act in question.

But if the Congress may *now* take from the trustee the property and vested rights which were pledged to it as security, and substitute something else, it may *ten years hence* take away all rights under the Act of 1916, and substitute still other alleged rights instead. At any rate against mere non-action of the Congress, the mortgagee will have no remedy. Under this Act of 1916 the Government is not required to turn over to the mortgagee *the full proceeds* which may have been received from the sale of lands now subject to the *lien of the mortgage*. The Act provides only for the payment of such proceeds *lessened by large*

sums claimed to have been received *by the railroad* and which the Government claims it has a right to offset *against the railroad!*

9. The provisions of Section 8 of the Act of 1916, after all, go only one step further. This section declares that "the title to all money arising out of said grant lands and now on deposit to await the final outcome of said suit" (*i. e.* this suit) is "hereby vested in the United States". But this suit was brought to decide whether the lands belonged to the United States or the railroad and it has been decided that they belong to the railroad; and it would seem, therefore, that the railroad is now entitled to receive such money, or at least, to have the matter decided by the Court. *Certainly such moneys, whether proceeds of sales of the granted lands or of the timber growing thereon (presumably sold with the consent of the Government), are subject to lien of the mortgage of the Union Trust Company.*

10. The rights of the Union Trust Company as trustee for bondholders under the mortgage made to it by the railroad are *vested rights*. We have said above that if there is anything which can be considered "property" under the Constitution it is *land* granted by the Government and for a valid consideration. Certainly if anything less tangible than land is to be considered "property" it is the vested rights of the trustee of this mortgage. To it the legal title to the lands has been conveyed, with (in substance) all the rights which the railroad enjoyed and powers to take possession, sell, etc. Moreover, for these rights the bondholders have paid \$20,000,000 which has been applied to the construction of the railroad.

If any citation of authorities should be necessary to establish that such rights are "property" the Court is referred to:

Cooley: Constitutional Law, p. 351.

Fletcher v. Peck, 6 Cranch. 87, 135.

People v. O'Brien, 111 N. Y. 1, 51.

Pearsall v. Great Northern Ry., 161 U. S. 646, 673.

Chicago B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 247-248, 251.

"The test of unlawful interference with property is that vested rights are abridged or taken away. Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."

Cooley: Constitutional Law, p. 351.

In *Fletcher v. Peck*, 6 Cranch, 87, this Court said (p. 135):—

"But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and, if those estates may be siezed by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

In *People v. O'Brien*, 111 N. Y. 1, the court said (p. 51):

"If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

In *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, this Court—speaking of vested rights—said (p. 673):

"As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant."

11. By way of a summary, we urge that the mortgage is unquestionably a valid contract between the railroad and the bondholders; that this contract was one which the railroad had power to make and which did not contravene the terms of the land grants; that for the obligations of the mortgage contract the bondholders gave valuable consideration; and that the property rights which they thus acquired are as inviolable as it is possible for any rights in property to be.

D.

The taking of the lands by the Government and the cancellation of the lien and other rights secured to the Union Trust Company by the mortgage cannot be supported under the reservation contained in the Act of July 25, 1866, to alter, amend, etc.

1. The twelfth section of the land grant Act of July 25, 1866, reads as follows: "That Congress may at any time, having due regard for the rights of the said Oregon & California Railroad Companies, add to, alter, amend or repeal this act."

This section is stated in one of the several recitals of the Act of June 9, 1916; but that it was not put forward seriously as authorizing such legislation appears sufficiently from the fact that that Act seeks to take back the lands received under the Act of May 4, 1870 (the West Side Grant) *although the latter act contained no such clause!* The lands received under this West Side Grant which remained unsold at the time this suit was brought amounted to 68,682 acres (Record, Vol. I, pp. 273, 508).

2. Since the Act of July 25, 1866 *expressly provided* that the power to alter, amend, etc., should be exercised only with "due regard for the rights of the Oregon & California Railroad Companies," it is hardly necessary to point out the limitations upon the exercise of such powers which are necessarily *implied*. These rights of the railroad have been conveyed to the mortgagee (See "C" above) and these rights by the very terms of the granting act cannot be taken away.

3. Most of the cases relating to the *implied* limitations upon the reserved power of a legislature to "alter, amend," etc., relate to the amendments of *charters of corporations*. In such cases the question is only as to the right of a legislature to alter the privileges which it has conferred upon, and the rules which it has made for the control of, one of its *own creatures*. Yet, *even in such cases*, it is well settled that the legislature cannot, under the guise of amending a charter, pass an act which will deprive the corporation of its property without due process of law, or take away vested rights.

4. Here we are not concerned with an amendment of a charter; for the charter of the Oregon and California Railroad was granted by the State of Oregon.

The power reserved is contained in the Act of July 25, 1866 by which the United States conveyed lands to the Railroad for a good consideration. Some of these lands have been sold strictly within the terms of the provisos of the granting act, and all the lands now owned by the Railroad have been mortgaged to the Union Trust Company as trustee for the bondholders.

Whatever may be the rule as to the amendment of *charters*, it is perfectly well settled that the power reserved in a *granting* act to "alter, amend," etc., is subject to certain well settled restrictions. Assuredly Congress cannot, in the form of an amendment, deprive its *grantee* of his property without due process of law, nor can it take vested rights away from its *grantee*, nor—above all—can it take away the *vested rights of third persons* who have dealt in good

faith with the grantee and have parted with a valuable consideration to acquire such rights.

Such power, at least if applied to the rights acquired by *third parties* before the amendment, would amount to a power to nullify the constitutional guarantees which protect property rights.

Sinking Fund Cases, 99 U. S. 700, 718-19, 720-1.

U. S. v. Union Pacific Ry. Co., 160 U. S. 1, 33.

Bienville Water Co. v. Mobile, 186 U. S. 212.

Chicago, M. & St. P. R. R. Co. v. Wisconsin, 238 U. S. 491.

People v. O'Brien, 111 N. Y. 1 (and cases cited).

1 *Kent's Commentaries*, star. p. 414.

Miller v. The State, 15 Wall. 478.

In the *Sinking Fund Cases*, 99 U. S. 700 (cited above) the Act incorporating the Union Pacific Railway Company and granting lands to it to aid in the construction of its road, contained a reservation of power to "alter, amend", etc., substantially as in the Act of 1866 granting lands to the Oregon & California Railroad Company. Speaking of the power of Congress under that reservation, this Court said (p. 720):

"That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the Corporation of the fruits actually reduced to possession of contracts lawfully made;"

Again the Court said (p. 721):

“In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, *it cannot now by direct legislation vacate mortgages already made under the powers originally granted*, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future.” (Italics ours.)

In *United States v. Union Pacific Railway Co.*, 160 U. S. 1 (cited above) a case involving the amendment of a *charter* contained in a statute granting lands to the Railroad by the United States, Mr. Justice Harlan, delivering the opinion of this Court said (p. 33):

“It would not be competent for Congress, under the guise of altering and amending the act in question, to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which the governmental aid was given. Neither could it, by such alteration or amendment, destroy rights actually vested, nor disturb transactions fully consummated. We may here, not

inappropriately, repeat what was said in the *Sinking Fund Cases*, 99 U. S. 700, 718, 719, 720",

continuing with quotations from the *Sinking Fund Cases*, set forth above (pp. 19-20 of this brief.)

In writing the opinion of this court in *Bienville Water Co. v. Mobile*, 186 U. S. 212 (cited above), Mr. Justice Brewer said (p. 222):

"It has been held that the right of revocation or amendment carries with it no right to appropriate the tangible property belonging to the corporation."

In the recent case of *Chicago M. & St. P. R. R. Co. v. Wisconsin*, 238 U. S. 491 (cited above), Mr. Justice Lamar, writing the opinion of this court, referred (p. 501) to two decisions of the Wisconsin court where it was held that "the right to amend a charter does not authorize the taking of the company's property without just compensation", and added: "The same view has been repeatedly expressed in the decisions of this court."

In *Miller v. The State*, 15 Wall. 478 (cited above), it was said by Mr. Justice Clifford (p. 498):

"Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation . . ."

5. The point, however, upon which the defendant Union Trust Company, as trustee for bond-

holders, wishes to lay the very greatest stress is that, whatever may be done by the Congress in the direction of altering or amending the granting acts, it cannot, by amendment, take away from purchasers the lands conveyed to them by the railroad in compliance with the provisos in the grants; nor can Congress, for exactly the same reasons, by an amendment take away the lien of the mortgagee or the rights conferred upon it by the mortgage.

[See quotation from the *Sinking Fund Cases* on page 38 above.]

E.

The Act of Congress of 1916 is not a valid exercise of the power of eminent domain.

1. The Act in question is entitled "An Act to alter and amend" the granting acts and does not purport to be, and therefore should not be construed as, an attempted exercise of the power of eminent domain.

2. Moreover, the lands sought to be seized are the property of a corporation organized under the laws of the State of Oregon and are a part of the territory of Oregon, and the power to legislate concerning them is vested in that state.

Wilcox v. Jackson, 13 Peters, 498, 517.

3. At any rate the Government of the United States can only take them "for such objects as are germane to the execution of powers granted to it" (*Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 657; *Kohl v. United States*, 91 U. S.

367, 372). To seize and sell the timber for its own profit and the division of the lands among farmers of its own choosing is not within any of the powers of Congress; for these are no longer public lands.

4. The most decisive answer to any claim that the Act of 1916 can be considered as an exercise of the power of eminent domain, lies in the provisions of the Constitution, and in the fact that the seizure of these lands is not for a *public* use.

The Fifth Amendment to the Constitution after providing that no person shall be deprived of his property without due process of law (that is to say in accordance with the law of the land as defined by the *Courts*) goes on to state the only case where private property may be seized by the State as follows: "Nor shall private property be taken for public use without just compensation."

Although not stated expressly, this clause has always been held to mean that private property shall not be taken for any purpose which is not a *public* purpose.

Charles River Bridge v. Warren Bridge, 11 Peters 420, 642.

Cleveland C. C. & St. L. Ry. v. Drainage Dist., 213 Ill. 83.

Washburn Real Property, 6th Ed. Sec. 2050.

In *Charles River Bridge v. Warren Bridge*, 11 Peters 420, McLean, J., made the statement frequently quoted (p. 642):

"Although the sovereign power in free governments may appropriate all the property public as well as private for public purposes making compensation therefor, yet it

has never been understood, at least, never in our republic, that the sovereign power can take the private property of A and give it to B by the right of 'eminent domain' or, that it can take it at all except for public purposes, or that it can take it for public purposes without the duty and responsibility of making compensation for the sacrifice of the private property of one, for the good of the whole."

In *Cleveland, C. C. & St. L. Ry. v. Drainage Dist.*, 213 Ill. 83, cited above, it was said (p. 85):

"Private property cannot be condemned by a person or corporation on the ground that general prosperity of the state or community would be promoted thereby, if the title to the property so taken is to be vested in such person or corporation as private property, to be used and controlled as other property."

Washburn, in his book on *Real Property* (Sec. 2050 cited above), speaking of the right of eminent domain, says:

"But this power does not imply any right on the part of the State to take the property of one citizen and give it to another, whether with or without compensation."

Here plainly the lands are not taken for a public purpose, and we believe that no case can be found in the books which would justify a claim that the proposed taking is for a public use.

An important purpose of the Act is obviously to enable the Government to raise a large sum from the sale of timber, keeping half for its own use and dividing the other half between the State and several of the Counties of Oregon. This, in a sense, might be said to be for the public or at least

for local benefit, for the money will be used to pay expenses of government. But, regarded in this light, the Act of 1916 amounts plainly to illegal taxation.

The lands themselves will come eventually into the ownership of private individuals; but that is exactly what the Constitution prohibits. It is the taking of the private property of A for the purpose of turning it over (to be used as private property) to B. To be sure, *all* of the property of the Oregon & California R. R. Co. is not to be given to one individual—probably it will be distributed to many private persons—but the cutting up of the property makes no difference in principle.

5. To justify the seizure of lands under the tremendous power of eminent domain, there must be a public *necessity* or expediency for such a course. Otherwise the seizure is invalid.

Nichols: The Power of Eminent Domain,
Sec. 291.

Story on the Constitution, Sec. 1956.

Cooley: Constitution Limitations, p. 756.

Here there is no necessity whatever for the seizure of the lands except to enable the Government to sell the timber *for its own profit*. As for the division of the land among actual settlers—perhaps a duty imposed by the granting acts, but certainly the *right* of the railroad—that object, in so far as it can be carried out at all, may be effected by the railroad, the owner of the lands, possibly under the direction of the Court, possibly even subject to the directions of the Congress. *Seizure of the lands by the Government can only*

be desired therefore in order to enable the Government to dispose of the lands contrary to the terms of its contract with the railroad!

6. It is perhaps only as a corollary to the rule just referred to—that private property cannot be seized even for a public purpose unless such a course is necessary—that the courts have held that private property cannot be taken by condemnation to be used for a purpose *to which it has been dedicated already*. It amounts merely to the transfer of property from one party to another.

Cary Library v. Bliss, 151 Mass. 364.

Lake Shore etc. Ry. v. Chicago etc. Ry., 97 Ill. 506, 512.

The Act in question attempts to take lands from the Railroad for the purpose (among others) of enabling the Government to sell it to actual settlers—in other words, what the Railroad might otherwise do itself.

7. That the Act in question was not intended as an exercise of the power of eminent domain appears further from the fact that no provision is made for the ascertainment of the “just compensation” required by the Constitution. It is not a function of the legislative branch of the Government to fix the amount of compensation due to the owner of property taken for governmental purposes.

Monongahela Nav. Co. v. U. S., 148 U. S. 312, 327.

Story: The Constitution, Sec. 1956.

This question must be determined by an impartial tribunal which will give the owner of the property taken a chance to be heard.

Cooley: Constitutional Law, p. 375.

Monongahela Nav. Co. v. U. S., *supra*.

Charles River Bridge v. Warren Bridge, 11 Peters, 420, 571.

“Just compensation” means of course the fair value of the property taken; and that the mortgagee does not accept the opinion of the Congress respecting the value of these lands appears sufficiently in the earlier parts of this brief.

8. By the terms of the Act in question, the title to the lands is vested at once in the United States, although the assumed value may not be paid for many years. It has been held that compensation must be made within a reasonable time, and that “the United States are not entitled to possession of the land until the damages have been assessed and actually paid.”

Bauman v. Ross, 167 U. S. 548, 598.

Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 659.

F.

The language of this Court in reference to this case (238 U. S. 393, 411-439) does not furnish any justification for the seizure of the lands by the Government or for the destruction or impairment of the mortgage.

1. The question presented to this Court when this case was argued before was whether the

provisos in the granting acts were conditions subsequent, for the breach of which the grants could be forfeited, or only covenants. This court decided that the provisos were restrictive covenants and stated that they applied to all the lands whether capable of settlement or not. That was as far as this court could go; but from its examination of the case it must have become apparent that here was a situation of great hardship, affecting not only the railroad but the United States as well, and that the way it should be remedied, and perhaps the only way it could be remedied, was by the action of Congress. It therefore enjoined (temporarily) any changes in the property and commended the situation to Congress. It seems needless to add that, under the circumstances (which will be referred to below) there was every reason to suppose that Congress, while perhaps accomplishing certain purposes for the benefit of the nation, would relieve the situation of the railroad and the mortgagee. Certainly there was no reason to expect that the Congress would, by way of remedial legislation, confiscate the lands and destroy the lien of the mortgage and the rights which had vested thereunder.

2. In making the land grant the Government (1) intended to give very substantial aid to the railroad in order that it might (2) obtain a railroad which would benefit the nation and carry its mails, supplies, troops, etc., and (3) that it might, incidentally, get the lands settled and cultivated. The railroad on the other hand expected (1) to receive very substantial aid from the lands and (2) with that aid to build its road and (3) get the lands in

the neighborhood of its road settled and cultivated.

3. As a matter of fact when the railroad came to patent its lands all the good lands in the valleys had been taken up already (Defendant's Ex. 258, Record, Vol. 13, 6691; Ex. 259, Record, Vol. 13, p. 6698); and the lands which it obtained were in the main covered with timber and unfit for settlement. (Record, Vol. IV, 2010, 1946, 1947; Ex. 260, Vol. XIII, 6696). Some lands were sold prior to 1887, but they were small in amount (238 U. S. at p. 408). However, by mortgages covering these lands and especially by the mortgage to the Union Trust Company in 1887, funds were obtained for the completion of the road (238 U. S. at p. 435; Stipulation Item 21, Record, Vol. IV, p. 1575).

Thus the great end desired by the Government was obtained; but the anticipated "aid" to the railroad had not been given. In later years some of the timber lands were sold in rather large tracts (238 U. S. at p. 408)—the only possible way—but the expenses of taking care of the lands and the taxes have been great (Ex. 320, Record, Vol. 13, p. 7167), while the railroads have been carrying, and must continue to carry, the troops, etc., of the United States without compensation (Record, Vol. 5, p. 2405-11, 2146).

The "*aid*" *expected from the government* has not been received and the mortgage upon the lands, representing the *loan made by foreign investors* remains unpaid!

4. Although the government has thus obtained its main purpose, its *incidental* purpose has not been accomplished. Why?

Because most of the lands are covered with timber and are incapable of cultivation and settlement, at least before the timber is removed; and therefore the lands cannot be sold to "actual settlers." Thus the ill considered provisos in the grants are preventing the government from obtaining its purpose and depriving the railroad of the "aid" to which it is entitled.

5. Since the "provisos" of the land grant which this court was asked to construe were, if read literally and strictly, entirely inapplicable to a grant of timber lands, and because the literal reading of them would lead to a result more or less unsatisfactory to all the parties, this Court was urged to add to their terms qualifications and limitations which as a practical matter would make them workable. The *railroad* claimed that the restriction of sales of "lands" to "actual settlers" upon the terms defined should be construed as referring to "lands susceptible of settlement"—that it should not be supposed that Congress in an act to "aid" the railroad would insert a clause preventing the railroad from disposing of a large part of its lands at all; the *Government* of the United States argued for an addition to the terms of these provisos in effect that upon a breach of the covenant the United States might re-enter and forfeit the lands; the *interveners and cross complainants* asked for an amplification of the terms of the provisos which would constitute the railroad not the *absolute owner* of the lands but a *trustee* thereof.

All of these contentions the court rejected and it construed the provisos strictly and literally saying (238 U. S. at p. 422):

"The grants must be taken as they were given. Assent to them, was required and

made and we can not import a different measure of the requirement and the assent than the language of the act expresses."

This Court referred to the more or less obvious hardships which this construction might impose upon the railroad but said (238 U. S. at p. 423) :

"Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law";

and again (at p. 435) :

"Whatever the difficulties of performance, relief could have been applied for and, it might be, have been secured through an appeal to Congress."

This Court referred to its own inability to grant relief, saying (238 U. S. at p. 436) :

"We can only enforce the provisos as written, not relieve from them."

and adding (p. 436) :

"For the same reason we cannot at the instance of the Government give a greater sanction to them than Congress intended, nor give to cross complainants and intervenors a right which the granting acts did not confer upon them."

6. This Court, being thus constrained to give an interpretation to the provisos which was unsatisfactory to all the parties (and which in effect might prevent the settlement of the lands—the *incidental* purpose of the Government—and prevent the railroad from receiving the "aid" from the Government upon the promise of which the railroad was built) very naturally referred the

questions presented to Congress—having first pointed out that the railroad should have appealed to Congress “to relax the law” long before. The object of this Court was, we believe, to afford the Congress an opportunity to relax the law and to provide a method by which the granted lands could be administered for the greater advantage of all concerned.

7. The scope of legislation which the Congress might have been expected to enact would of course depend largely upon the disposition of that powerful body. It would be supposed, however, that the Congress would either (1) change the contract of the Government with the railroad and take away the vested rights of the railroad and the mortgagee but *only upon condition that the Act be consented to by the railroad and the mortgagee*, or (2) attempt to change the terms of the covenants, but only in such a way as not to effect the purpose of the grant or take away vested rights.

Such legislation would naturally provide for a classification of the lands, determining what lands if any are now ready to be sold to “actual settlers” and what lands can be sold thus only after the timber is removed; defining who should be considered to be “actual settlers”; providing for the removal of the timber by the railroad (the owner) from such lands as would thus be rendered capable of actual settlement, and the subsequent sale of the lands to “actual settlers”; and further providing for the disposition of those lands owned by the railroad which can never, because of their character, be sold to actual settlers.

8. Instead of proceeding on any such lines, the Congress has passed an Act one of the main purposes of which (if not the main purpose) is to secure large sums of money for itself, and which disposes of the problems presented to it in almost complete disregard not only of the moral rights, but of the indefeasible property rights of the railroad and *the mortgagee*, trustee for bondholders.

9. Perhaps the claim will be made by the Government that this court in suggesting legislation which would "secure to the railroad company all the value conferred by the granting acts" has adjudged that "all the value" does not exceed \$2.50 an acre. This Court decided nothing of the sort. It did not hold that the railroad had *nothing* but a power of sale, but on the contrary that it had the *full ownership* of the lands *without any implied limitations* and *including the power of sale* although with certain restrictions upon that power. This Court said (238 U. S. at p. 434):

"There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the Government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.'"

And again (238 U. S. at p. 432):

"The Acts of Congress omit regulation. Their language is not directive; it is restrictive only. *With this exception the grant is unqualified.*" (Italics ours.)

POINT II.

THE OWNER OF THESE LANDS HAS THE UNQUALIFIED RIGHT TO THEIR USE, INCLUDING THE RIGHT TO THE TIMBER THEREON, AT LEAST SO FAR AS SUCH USE WILL NOT PREVENT THE SALE OF THE LANDS TO ACTUAL SETTLERS.

1. Practically all of the granted lands which remain unsold are covered with timber, and it is the purpose of the Government under the act of June 9, 1916, first to strip these lands of the timber and subsequently to offer them for settlement. The evidence shows (1) that a large part of these lands would not be fit for cultivation even if cleared of the timber, and (2) that another large part of these lands, although susceptible of cultivation after the timber is removed, cannot be settled upon and cultivated until after such removal.

(See brief for Union Trust Company upon the first argument in this Court, pages 31-77).

As to just how much of the land can never be cultivated and how much cannot be settled until the timber has been removed, there is room for dispute, but that there is a considerable quantity of lands of both kinds must be conceded.

2. That these lands were chiefly valuable for timber was clearly recognized by this Court upon the former appeal, for it wrote:

“It is however clear even from the Government’s summary of the evidence that lands which may be fit for cultivation have a greater value on account of the timber which is upon

them. Besides for our present purposes we may accept the assertion of the defendants." (238 U. S. at p. 438.)

The "assertion of the defendants" thus referred to appears just before (pp. 437-8) in the opinion, as follows:

"In answering, the defendants averred * * * that the lands were chiefly and in most instances solely of value because of the timber thereon and are not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of homes thereon at no time 'exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of which were sold to actual settlers,' etc."

It was with a full understanding, therefore, that a large part of the lands could not be sold to actual settlers, that this Court decided that the restrictive covenants must be held to apply to all the lands—in other words that some of these lands could not be sold for a very long time, and others not at all.

3. The question now presented is whether the Railroad can use the timber upon these lands until such times as they may be sold.

This question is of the greatest importance to the Union Trust Company as trustee for bondholders, for all the rights of the railroad in the lands have been mortgaged to it, and, if the timber can be used by the present owner or by a purchaser upon foreclosure sale, then the bonds which it represents will surely be paid—without dependence upon the financial situation or prosperity of the railroads. These bondholders who

advanced their money to construct this road upon the security of these lands, are, we respectfully urge, entitled to every bit of value which belongs to the security.

This question—the right of the owner to use the timber—received very little consideration at the time of the decision of the first appeal in this case. It seems to have been taken for granted that the right to use the *timber* was an incident of ownership, and the question argued at length was as to which party was entitled to own the *land*, the railroad or the United States.

Now however the question is sharply presented in two ways:

(a) By the decree of the District Court upon the mandate of this Court, which *permanently* enjoins the cutting of timber, and

(b) By Act of Congress of June 9, 1916, by which the Government has attempted to seize the lands and sell the timber for its own profit.

If the owner of the lands has the right to cut the timber, it follows, not only that the decree entered in the District Court is erroneous, but also that the Act of Congress is invalid.

We shall proceed therefore to discuss the question as to whether the owner of the lands or the Government has the right to use the timber, as it is of vital importance upon both points.

A.

This court certainly did not decide that the owner could not use the timber, but, on the contrary, intimated that it could do so.

1. To establish that the Decree of the District Court did not follow the decision of this Court, but on the contrary contained very important provisions in no way sanctioned by this Court, needs no argument whatever. It is only necessary to arrange side by side (1) the carefully framed conclusions of this Court as stated in the opinion and (2) the provisions of the decree as entered.

[We omit from the comparison, Sections 1, 5, 6 and 7 of the decree.]

OPINION OF SUPREME
COURT

DECREE AS ENTERED

(238 U. S. 393, 438)

“That the railroad company

“should not only be

“enjoined from sales (referring to “lands”)

“2. That the defendants and their respective officers and agents

“be and each is hereby

“enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within

the place or indemnity limits of the grants thereby made,

"in violation of the covenants,

"to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre;

"and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

"but" the Railroad Company

"3. That the defendants and their respective officers and agents

should be

"be, and each is hereby

"enjoined from any disposition of them whatever" (referring to the lands)

"enjoined from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof

"or of the timber thereon

"or of the timber thereon

"or any part thereof

"or of any mineral or other deposits therein;

"and from cutting or authorizing the cutting or removal of any of the timber thereon.

"from cutting, removing or authorizing the cutting or removal of the timber thereon

"or any part thereof

"from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to

wait the final decision of the Supreme Court of the United States in this case

"until congress shall have a reasonable opportunity to provide by legislation

"until Congress shall have a reasonable opportunity to make provision by legislation

"for their disposition

"for the disposition of said lands, timber,

"money, mineral or deposits

"in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroad.

"in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

"If Congress does not make such provision

"4. That if Congress does not make provision for the disposition as aforesaid of said lands timber,

"money, timber, mineral or other deposits

"the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of

"the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the

so much of the injunction herein ordered as enjoins any disposition	injunction herein ordered as forbids any disposition
---	--

“of the lands and timber

“of the said lands, timber

“money, mineral or other deposits, or any part thereof

“until Congress shall act.

“until Congress shall act

“and the court in its discretion may modify the decree accordingly”

“and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.”

2. From the comparison above, it is obvious that to the *permanent* injunction against *sales* of the lands, contrary to the terms of the covenant, as directed by this Court, there has been added a *permanent* injunction against the *use* of said lands at least so far as relates to the taking of timber and minerals; *also* that to the *temporary* injunction against any sales of the lands (whether contrary to the covenant or not) or the timber thereon, as directed by this Court, there has been added an injunction against the removal of *any mineral* or other deposits in the land, and *further* an injunction against disposing of, receiving or exerting any control over *any moneys* received

from sales of land or timber (although not in violation of any covenant).

3. It is not necessary to refer to the briefs submitted or to the *earlier* parts of the opinion of this Court to show that this Court was fully aware of the fact that the timber on these lands is valuable and that it understood perfectly that it would be quite possible, if the lands were not sold, to use and cut timber and remove minerals and other deposits therefrom; it is sufficient to refer to its *conclusions* as stated *at the end of the opinion*. It there appears that in order to preserve the lands exactly as they were pending legislation, this Court directed that not only should the Railroad permanently "be enjoined from *sales*" (*i. e.*, of the lands, which had been the subject under consideration) "in violation of the covenants, but enjoined from *any disposition of them*" (*i. e.*, the lands just referred to) "whatever, or of the timber thereon, and from the cutting or authorizing the cutting or removal of any of the timber thereon, until, etc."

Thus so far as the *permanent* injunction was concerned—the determination of the rights of the parties as limited by the covenants—this Court, *having immediately in mind the possibility of removing timber*, enjoined sales of the lands only, making no limitation except temporarily upon the right to use the timber.

This followed naturally from the keynote of the opinion: that the covenant must be given its *literal meaning*, harsh as the effect might be upon the railroad, and unsatisfactorily as such a construction might be to the Government and also to the cross-complainants and intervenors all of whom wished to have its terms added to or enlarged;

that although Congress might relax the severity of the covenant this Court could not; that the railroad could not sell any lands except in accordance with the terms of this restrictive covenant, but that "there was a complete and absolute grant to the Railroad Company with power to sell, limited *only* as prescribed" (*italics ours*) and that "with this exception the grant is unqualified" (238 U. S. at pp. 434, 432, Record, Vol. I, pp. 154, 151).

If Congress should not legislate on the subject, it was contemplated, we submit, that the temporary injunction against "any disposition" of lands or timber would be vacated. There would then remain as the final judgment (if the decree of the District Court had been entered in compliance with the opinion of this court) a permanent injunction against a sale of the *lands* except in accordance with the covenant, but with no restraint upon the use of the lands, or the preparation of the lands for sale.

If this Court had intended in its carefully framed conclusions to decide that the railroad should be permanently enjoined from any sales of the lands *and also* from any use of the timber or minerals (*i. e.*, as has now been adjudged in the decree) *how simple it would have been to say so!* Instead, in very sharp contrast, and in the very next clause, this Court has pointed out that the *temporary* injunction should be against *any disposition* of land or timber. The conclusion seems irresistible that this Court has decided, in effect, that the covenant which restricts the sale of the *lands* does not affect the rights of the owner to use the *timber*.

B.

The right of an owner to use his property should not be destroyed in any way or even restricted except for a most compelling reason.

1. If it can be said that the right of the owner to cut timber has not been decided already by this Court, we believe there can be little doubt as to its decision now in view of the construction which it has given already to the covenant, and in view of the law defining a person's right to the use of his property.

2. The Railroad paid the price for these lands and became the absolute owner thereof. The provisos were a restriction upon the power of sale, but, except as its power to dispose of the lands was thus limited, its rights in the lands became the same as those of other owners of real property. As often as has been necessary, courts have declared that the rights of an owner in his property are unlimited—except by the maxim which requires that one must not use his own property in such a way as to injure another. (*Reeves' Law of Real Property*, Sec. 423.) Here the Railroad is bound, in addition, to use its lands in such a way as not to violate the proviso, but, except as the proviso may require that the timber shall not be cut, its rights as an owner are unlimited. It follows that if the covenant was restrictive, as we believe this court has determined, then the Railroad may use the lands in any way and cut the timber therefrom until such times as the lands shall be sold. If, on the other hand, it could be

said that the covenants are not "restrictive only" but impose an affirmative obligation on the Railroad to sell, then, at the least the Railroad may use the timber unless such use would prevent its compliance with the covenant.

The situation is somewhat similar to that of a tenant for life or for a term of years who holds under an implied covenant to surrender the land at the end of the term in as good condition as when he received it. Except as limited by the implied covenant, the tenant may use the land as he pleases and remove timber therefrom.

3. Unquestionably the grant of lands by the Government vested in the grantee all the rights of complete ownership. Among such rights are included, of course, the right to cut the timber.

Certainly the *United States* has not retained any rights in the timber. It has parted with the lands by an absolute grant and for a valuable consideration. (*Burke v. Southern Pacific R. R. Co.*, 234 U. S., at p. 679). If it can be argued that the timber belongs to any one other than the Railroad Company, the argument must relate to the claims of prospective settlers, but this court has expressly decided that the prospective settlers (intervenor and cross-complainants in this case) have no rights in the timber.

4. The granting acts are clear enough in their terms so far as timber is concerned. They grant lands to the Railroad (which, of course, includes the timber); and whereas, if it had been intended to cut down the grant by taking away its possible use, the acts might have excepted from the operation of the grants the timber upon the lands,

yet it is noticeable that there is no sign whatever of any such exception of the timber from the grant. It should be noticed, further, in this connection, that the Acts which it passed show that the Congress had clearly in mind (1) the possibility of making exceptions from the grant and (2) the value of timber; for it *expressly excepted mineral lands* from the grants and conveyed to the Railroad the right to use for the construction of the road *timber* taken from such mineral lands.

If the Congress had intended to except the *timber* from the grant, it could only have been accomplished by an exception similar to that applied to the *mineral lands*.

It should be noticed in this connection that although mineral lands were excepted from the land grants, it was expressly provided that "the term mineral lands shall not include lands containing coal and iron". That such lands could not be sold to actual settlers—tillers of the soil—but might be very valuable in the construction and subsequent operation of the Railroad is obvious, and the only possible conclusion is that the Congress in accomplishing the primary purpose of the grants to aid the construction of the Railroad, intended and expected that the Railroad should have the use of all valuable things in or upon the land excepting only the minerals (precious metals) which were especially excepted.

A sidelight on how an Act should be framed, which is intended to deprive the owner of land of the use of timber upon it, is found in Section 3 of the Act of Congress of June 9, 1916, relating to this very land, which provides that any person entering mineral lands "*shall not acquire title to timber.*"

5. We have said above that the only term of the land grant (the contract between the Government and the Railroad) which can be claimed to cut down the right to use the lands is the covenant which has been construed already by this Court; and that no construction of the covenant warrants the reading into it of a clause depriving the owner of the right to use or sell the timber. In addition, we should point out that this Court has already in construing this covenant held firmly that it would not permit any qualification or addition to its terms, (although a literal construction might and probably would, involve great hardship.) This Court has said (238 U. S. at pp. 434, 432) that the grants constitute "a complete and absolute grant to the Railroad Company with power to sell *limited only* as prescribed", and (referring to the restrictive language of the provisos) that "with this exception *the grant is unqualified*. (Italics ours.) Yet the Government would now have this Court insert in the covenant contained in the granting acts, another *restriction* of great importance. In brief, to the proviso which reads:

"And provided further that the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not greater than one-quarter section to one purchaser and for a price not exceeding \$2.50 per acre;"

the Government seeks to have *added* something like the following:

And provided further that until such times as the lands are sold by the Railroad, even if they are never sold, the Railroad shall not use the lands in any way or the timber, coal, iron and stone thereon!

6. An examination of the authorities will disclose cases illustrating the limitation upon the rights of a tenant for life, etc., to use timber; and there are well considered cases in this Court establishing the rights to the timber of those to whose estate a condition subsequent is annexed.

Schulenberg v. Harriman, 21 Wall, 44.

Railroad Land Co. v. Courtright, 21 Wall, 310.

United States v. Loughrey, 172 U. S. 206.

United States v. Tennessee & Coosa R. R., 176 U. S. 242.

There are also cases in the State courts holding that the owner of a determinable fee is entitled to use the products of the lands.

Gannon v. Peterson, 193 Ill. 372.

Faraton v. Green, 108 N. C. 339.

The books, however, will be searched in vain, we believe, for any case which will justify the claim now made by the Government that the owner of a "complete and absolute grant" can be deprived of the right to use the timber growing upon his lands.

C.

The owner, having all the burdens and obligations, should have all the rights and privileges of proprietorship.

1. An "actual settler" is one who actually resides upon the land and for agricultural purposes.

(*Peterson v. First Division, St. Paul, etc., R. R. Co.*, 27 Minn. 218; *Stroud v. Missouri River, etc., R. R. Co.*, 4 Dillon 396, 403).

There is a large amount of these lands which can never be used for agricultural purposes and which, therefore, can never be sold under the terms of the provisos. There are, moreover, other lands which are very heavily timbered, from which the timber cannot be removed except at great cost, and which cannot be sold, therefore, to actual settlers under the terms of the provisos until the timber has first been removed. (Under the Act of June 9, 1916, the Government proposes to sell this timber and have it removed as a preliminary to disposing of the lands.) Moreover, it is no small matter to remove this timber; for

“No man would be willing to subjugate this piece of forest for the mere sake of cultivating it”; (See *United States v. Budd*, 144 U. S., 154, at pp. 167, 168).

and these lands can be cleared from timber only when the lands or timber thereon are sold in large quantities.

It follows from the above that the railroad having constructed its line at the instance and for the benefit of the United States, will be prevented from selling these lands in compliance with the provisos; and, in so far as it may receive any benefit whatever from their ownership, it must be only such incidental advantages as are derived from the occupation of the lands and the use of the timber, coal, iron, etc.

2. During the forty years or more that the Railroad has owned them, these lands have been sub-

jected to heavy taxation in the State of Oregon. Had the lands been owned by the United States there could have been no taxation by the State, and if the timber thereon (the only value) had belonged to the United States, the Railroad would have been spared most of these expenses. Moreover, during all these years the Railroad has had the duty of watching over these lands and protecting them from fire and trespass. If the Railroad had not thus defended its lands against depredations and destruction, much of the timber would have been destroyed already. The cost of such protection for a small tract may not be considerable; for this great tract of land it has amounted to great sums. Yet it is now claimed that this timber which was conveyed by the Government for a valuable consideration to the Railroad and over which the Railroad has ever since performed all the duties of ownership, including the payment of taxes, is now of no value whatever to the railroad as it cannot be permitted in any way to use its own property!

3. Without regard to the provisos of the land grants, it would seem only a matter of simple justice to permit the one who must bear the burdens of ownership of real property to receive the advantages therefrom. To the mortgagee a contrary ruling seems especially harsh because the taxes, based upon the value of the lands with timber thereon, have been accumulating for some time and they are a lien prior to that of the mortgage; so that it follows that, if the Railroad, being prevented from selling the lands by the provisos, cannot make any use of them, the security, upon which in large part the bondholders advanced their

money for the construction of the Railroad, will be lost.

D.

The main purpose of the grant would be defeated if the railroad should be deprived of the right to use the timber while it remains the owner of the lands.

1. As this Court has already determined, the paramount purpose of the land grants was to obtain the construction of the Railroad, and it should follow that (since the Railroad could hardly have been constructed without the land grants) a most important part of that purpose was to furnish aid to the Railroad. A small amount of lands only have been sold in accordance with the provisos, and, although some lands have been sold in greater quantities and for greater prices than required by the provisos, it is apparent, from the terms of the Act of 1916, that the Government intends to claim against the Railroad all amounts received for the lands in excess of \$2.50 an acre. Meanwhile, the cost of taking care of the lands and preserving the timber, together with the taxes which have been paid, have amounted to very great sums. The lands now remaining, because covered by timber or otherwise, cannot be sold in compliance with the covenant. It follows necessarily that, unless the timber on these lands can be cut by the Railroad, it can derive no substantial profit from the lands, although obliged to continue payment of taxes to the State

and to transport munitions, troops, etc., for the Government without charge.

2. If this result is reached, the Government will have obtained what it sought to purchase; but the railroad will never receive the price which the Government undertook to pay (to wit, "aid" through the granted lands), but will be saddled instead with a permanent burden.

E.

The covenant relating to the sale of lands is restrictive only; the railroad is not compelled to sell the lands.

1. This Court has decided already, we understand, that the terms of the proviso limiting the exercise of the power of sale are *restrictive*. It has said (238 U. S. at p. 432; italics ours):

"The acts of Congress omit regulation. The language is not directive; it is *restrictive* only. With this exception, the grant is unqualified."

and (at p. 416):

"There was also the purpose to *restrict* the sale of the granted lands to actual settlers."

and (at p. 418):

"The contention encounters the Government's admission that there was no obligation imposed upon the Railroad to sell."

and (at p. 434) :

“When the granted lands were withdrawn from those laws (public land laws) and primarily devoted to another purpose they were committed to another power to be administered for such purpose, and a discretion in the exercise of the power, within the *restriction imposed*, was necessarily conferred.”

and (at p. 434) :

“There was a complete and absolute grant to the Railroad Company with power to sell *limited only* as prescribed and we agree with the Government that the Company ‘might choose the actual settler and sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.’ ”

That a covenant to sell to “actual settlers only,”—like a deed to use land for a certain purpose only—does not imply an affirmative obligation to sell the lands or use the property, seems too plain for argument.

See *Madore's Appeal*, 129 Penn St., 15, 25.

2. We urge therefore that since the covenants are restrictive and there is no obligation upon the railroad to sell the lands, it may use them, until they are sold, in any way for its advantage. It is important however to notice that, even if there is an affirmative obligation upon the railroad to sell the lands, it should be within its power, not only to do whatever will be of assistance in selling the lands (as for instance the clearing of the timber from the lands), but also to exercise every right of ownership over the

lands which will not prevent sales thereof in accordance with the provisos. If the removal of any of the timber would prevent compliance with the terms of the covenant, the burden should be upon the Government to establish that fact. This, it would seem, they are estopped from doing by the very terms of the Act of June 9, 1916, which provides for the cutting of the timber in order to prepare the lands for sale—thus confirming the evidence, which is to be found in the record of this case, as to the desirability of removing the timber.

POINT III.

The decree should not have awarded costs against the Union Trust Company individually and as Trustee.

At the time this suit was brought the Government would not have been satisfied with strict compliance with the provisos in the grants; the purpose of the suit was to have the lands forfeited and *the lien of the mortgage cancelled*. Except for this purpose, it was unnecessary to make the Union Trust Company a party at all. The Trust Company was, of course, bound to resist this claim and did so successfully, the decree of the District Court being reversed by this Court.

The decree entered upon the mandate of this Court, to be sure, enjoins *all the defendants* from selling the lands, but in this respect it departs from the opinion of this Court, which directed

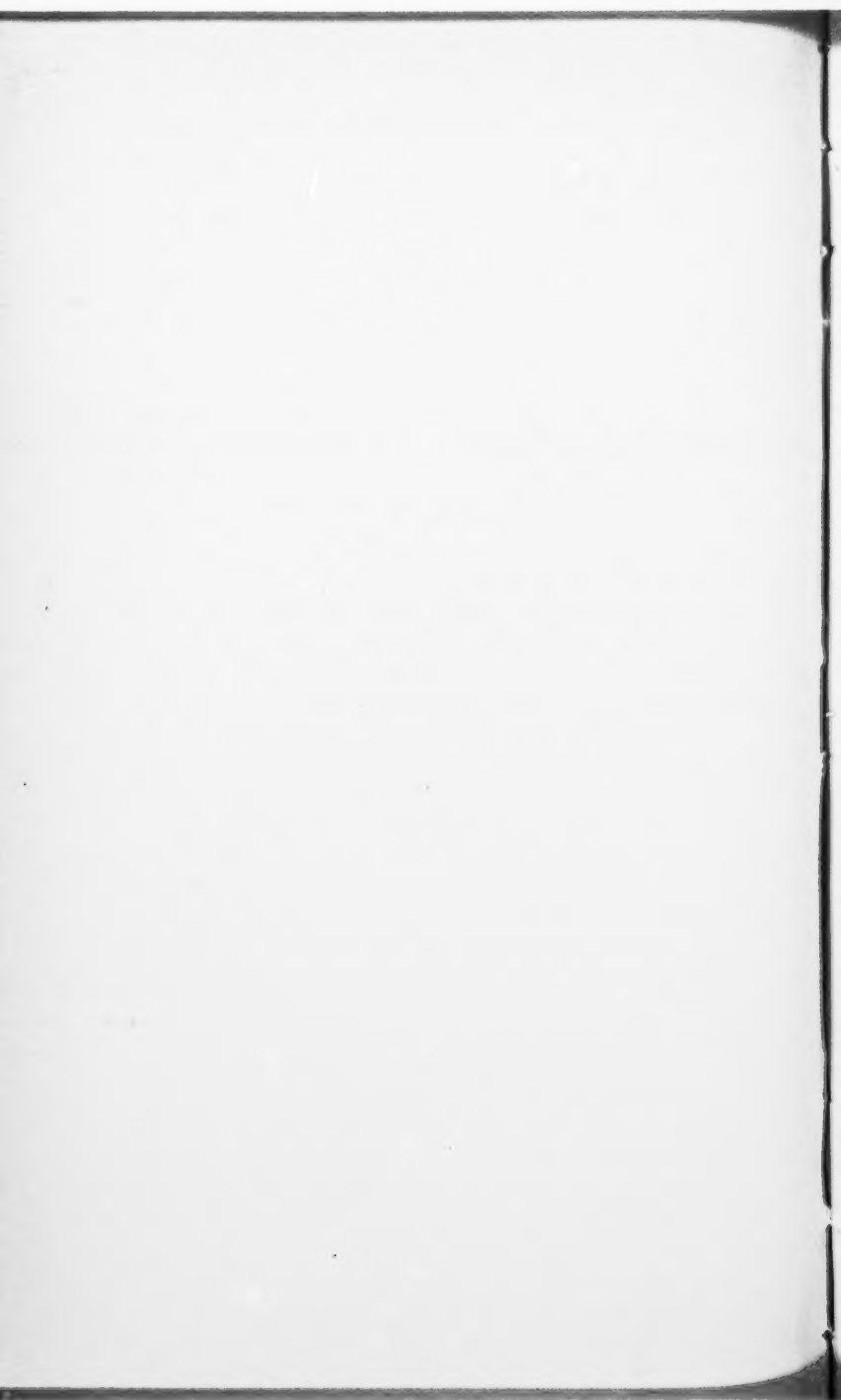
only an injunction against the defendant *railroad company*. Upon such a record there was no justification for the imposition of costs upon the defendant Union Trust Company.

CONCLUSION.

For the reasons stated above, the Act of June 9, 1916, should be adjudged invalid; and the decree appealed from should be modified so as to conform to the mandate of this Court, and especially so as to enjoin only sales of the lands contrary to the terms of the covenants, without prejudice to the rights of the railroad and the mortgagee to use the lands and the timber thereon and the coal and iron therein.

DOLPH, MALLORY, SIMON & GEARIN,
MILLER, KING, LANE & TRAFFORD,
Solicitors for Defendant and Appel-
lant, Union Trust Company of
New York.

PERRY D. TRAFFORD,
Of Counsel.



Appendix A.**ACT OF CONGRESS OF JUNE 9, 1916, COMMON-
LY KNOWN AS THE FERRIS ACT.**

[PUBLIC—No. 86—64TH CONGRESS.]

[H. R. 14864.]

An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, and to alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May fourth, eighteen hundred and seventy, and for other purposes.

Whereas by the Acts of Congress approved April tenth, eighteen hundred and sixty-nine (Fourteenth Statutes at Large, page two hundred and thirty-nine), and May fourth, eighteen hundred and seventy (Sixteen Statutes at Large, page ninety-four), it was provided that the lands granted to aid in the construction of certain railroads from Portland, in the State of Oregon, to the northern boundary of the State of California, and from Portland to Astoria and McMinnville, in the State of Oregon, should be sold to actual settlers only, in quantities not exceeding one hundred and sixty acres to each person and at prices not greater than \$2.50 per acre; and

Whereas the Oregon and California Railroad Company, beneficiary of said acts, has violated the terms under which the said lands were granted by selling certain of said lands to persons other than actual settlers, by selling in quantities of more than one-quarter section to each person, by selling at prices in excess of \$2.50 per acre, and by refusing to sell any further portions of such lands to actual settlers at any price, and in so doing has willfully violated the terms of the statutes by which the said lands were granted; and

Whereas in the suit instituted by the Attorney-General of the United States, pursuant to the authority and direction contained in the joint resolution of April thirtieth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page five hundred and seventy-one), the Supreme Court of the United States, in its decision rendered June twenty-first, nineteen hundred and fifteen (Two hundred and thirty-eighth United States, page three hundred and ninety-three), ordered that the Oregon and California Railroad Company be enjoined from making further sales of lands in violation of the law, and that the said railroad company be further enjoined from making any sales whatever of either the land or the timber thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands in accordance with such policy as Congress might deem fitting under the circumstances and at the same time secure to the railroad company all the value conferred by the granting Acts; and

Whereas it was expressly provided by section twelve of the Act of July twenty-fifth, eighteen hundred and sixty-six (Fourteenth Statutes at

Large, page two hundred and thirty-nine), that Congress might at any time, having due regard for the rights of the grantee railroad company, add to, alter, amend, or repeal the Act making the grant; and

Whereas the Oregon and California Railroad Company and its predecessors in interest received a large sum of money from sales of said land for prices in excess of \$2.50 per acre, and from leases, interest on contracts, and so forth; and

Whereas the aforesaid granting Acts conferred upon the said railroad company the right to receive not more than \$2.50 per acre for each acre of land so granted: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to so much of the lands granted by the Act of July twenty-fifth, eighteen hundred and sixty-six, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, and to so much of the lands granted by the Act of May fourth, eighteen hundred and seventy, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," for which patents have been issued by

the United States, or for for which the grantee is entitled to receive patents under said grant, as had not been sold by the Oregon and California Railroad Company prior to July first, nineteen hundred and thirteen, be, and the same is hereby, revested in the United States: *Provided*, That the provisions of this Act shall not apply to the right of way to the extent of one hundred feet in width on each side of the railroad and all lands in actual use by said railroad company on December ninth, nineteen hundred and fifteen, for depots, sidetracks, wood yards, and standing grounds.

SEC. 2. That the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, is hereby authorized and directed, after due examination in the field, to classify said lands by the smallest legal subdivisions thereof into three classes, as follows:

Class one. Power-site lands, which shall include only such lands as are chiefly valuable for water-power sites, which lands shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public lands of like character.

Class two. Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision.

Class three. Agricultural lands, which shall include all lands not falling within either of the two other classes:

Provided, That any of said lands, however classified, may be reclassified, if, because of a change of conditions or other reasons, such ac-

tion is required to denote properly the true character and class of such lands: *Provided further*, That all the general laws of the United States now existing or hereafter enacted relating to the granting of rights of way over or permits for the use of public lands shall be applicable to all lands title to which is revested in the United States under the provisions of this Act. All lands disposed of under the provisions of this Act shall be subject to all rights of way which the Secretary of the Interior shall at any time deem necessary for the removal of the timber from any lands of class two.

SEC. 3. That the classification provided for by the preceding section shall not operate to exclude from exploration, entry and disposition, under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands, except power sites: *Provided*, That any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided in section four, but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States.

SEC. 4. That nonmineral lands of class two shall not be disposed of until the Secretary of the Interior has determined and announced that the merchantable timber thereon has been removed, and thereupon said lands shall fall into class three

and be disposed of in the manner hereinafter provided for the disposal of lands of that class.

The timber on lands of class two shall be sold for cash by the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to citizens of the United States, associates of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof, at such times, in such quantities, and under such plan of public competitive bidding as in the judgment of the Secretary of the Interior may produce the best results: *Provided*, That said Secretary shall have the right to reject any bid where he has reason to believe that the price offered is inadequate, and may reoffer the timber until a satisfactory bid is received: *Provided further*, That upon application of a qualified purchaser that any legal subdivision shall be separately offered for sale such subdivision shall be separately offered before being included in any offer of a larger unit, if such application be filed within ninety days prior to such offer: *And provided further*, That said timber shall be sold as rapidly as reasonable prices can be secured therefor in a normal market.

The Secretary of the Interior shall as soon as the purchase price is fully paid by any person purchasing under the provisions of this section issue to such a purchaser a patent conveying the timber and expressly reserving the land to the United States. The timber thus purchased may be cut and removed by the purchaser, his heirs or assigns, within such period as may be fixed by the Secretary of the Interior, which period shall be designated in the patent; all rights under said patent shall cease and terminate at the expira-

tion of said period: *Provided*, That in the event the timber is removed prior to the expiration of said period the Secretary of the Interior shall make due announcement thereof, whereupon all rights under the patent shall cease.

No timber shall be removed until the issuance of patent therefor. All timber sold under this Act shall be subject to the taxing power of the States apart from the land as soon as patents are issued as provided for herein.

SEC. 5. That nonmineral lands of class three shall be subject to entry under the general provisions of the homestead laws of the United States, except as modified herein, and opened to entry in accordance with the provisions of the Act of September thirtieth, nineteen hundred and thirteen (Thirty-eighth Statutes at Large, page one hundred and thirteen). Fifty cents per acre shall be paid at the time the original entry is allowed and \$2 per acre when final proof is made. The provisions of section twenty-three hundred and one, Revised Statutes, shall not apply to any entry hereunder and no patent shall issue until the entryman has resided upon and cultivated the land for a period of three years, proof of which shall be made at any time within five years from date of entry. The area cultivated shall be such as to satisfy the Secretary of the Interior that the entry is made in good faith for the purpose of settlement and not for speculation: *Provided*, That the payment of \$2.50 per acre shall not be required from homestead entrymen upon lands of class two when the same shall become subject to entry as agricultural lands in class three: *Provided further*, That during the period fixed for the

submission of applications to make entry under this section any person duly qualified to enter such lands who has resided thereon, to the same extent and in the same manner as is required under the homestead laws, since the first day of December, nineteen hundred and thirteen, and who has improved the land and devoted some portion thereof to agricultural use, and who shall have maintained his residence to the date of such application, shall have the preferred right to enter the quarter section upon which he was so residing whether such lands shall be of class two or class three and where such quarter section does not contain more than one million two hundred thousand feet board measure of timber, and where the quarter section contains more than the said quantity of timber such person may enter the forty-acre tract, or lot or lots containing approximately forty acres, upon which his improvements, or the greater part thereof, are situated: *Provided further*, That a prior exercise of the homestead right by any such person shall not be a bar to the exercise of such preference rights: *And provided further*, That all of the following described lands which may become revested in the United States by operation of this Act, to-wit: Township one south, range five east, sections twenty-three and thirty-five; township one south, range six east, sections three, five, seven, nine seventeen, nineteen, twenty-nine, thirty-one, and thirty-three; township two south, range five east, sections one and three; township two south, range six east, sections one, three, five, seven, nine, and eleven; township two south, range seven east, section seven; township three south, range three east, section fifteen; township four south, range four

east, sections eleven and thirteen; township four south, range five east, sections nineteen and twenty-nine; and township twelve south, range seven west, sections fifteen, twenty-one, twenty-three, twenty-seven, thirty three, and thirty-five, Willamette meridian and base, State of Oregon, shall be withheld from entry or other disposition for a period of two years after the approval hereof.

SEC. 6. That persons who purchase timber on lands of class two shall be required to pay a commission of one-fifth of one per centum of the purchase price paid, to be divided equally between the register and receiver, within the maximum compensation allowed them by law; and the register and receiver shall receive no other compensation whatever for services rendered in connection with the sales of timber under the provisions of section four of this Act.

SEC. 7. That the Attorney General of the United States be, and he is hereby, authorized and directed to institute and prosecute any and all suits in equity and actions at law against the Oregon and California Railroad Company, and any other proper party which he may deem appropriate, to have determined the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of said granted lands, whether sold or unsold, patented or unpatented, and which should be charged against it as a part of the "full value" secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court. In making this determination the court shall take into consideration and give due and proper legal

effect to all receipts of money from sales of land or timber, forfeited contracts, rent, timber depreciations, and interest on contracts, or from any other source relating to said lands; also to the value of timber taken from said lands and used by said grantees or their successor or successors. In making this determination in the aforementioned suit or suits the court shall also determine, on the application of the Attorney General, the amount of the taxes on said lands paid by the United States, as provided in this Act, and which should in law have been paid by the said Oregon and California Railroad Company, and the amount thus determined shall be treated as money received by said railroad company.

SEC. 8. That the title to all money arising out of said grant lands and now on deposit to await the final outcome of said suit commenced by the United States in pursuance of said joint resolution of nineteen hundred and eight is hereby vested in the United States, and the United States is subrogated to all the rights and remedies of the obligee or obligees, and especially of Louis L. Sharp, as commissioner, under any contract for the purchase of timber on the grant lands.

SEC. 9. That the taxes accrued, and now unpaid on the lands revested in the United States, whether situate in the State of Oregon or State of Washington, shall be paid by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the approval of this Act, and a sum sufficient to make such payment is hereby appropriated, out of any money in the Treasury not otherwise appropriated.

SEC. 10. That all moneys received from or on account of said lands and timber under the provisions of this Act shall be deposited in the Treasury of the United States in a special fund, to be designated "The Oregon and California land-grant fund," which fund shall be disposed of in the following manner: The Secretary of the Interior shall ascertain as soon as may be the exact number of acres of said lands, sold or unsold, patented to the Oregon and California Railroad Company, or its predecessors, and the number of acres of unpatented lands which said railroad company is entitled to receive under the terms of said grants and the value of said lands at \$2.50 per acre. From the sum thus ascertained he shall deduct the amount already received by the said railroad company and its predecessors in interest on account of said lands and which should be charged against it as determined under section seven of this Act; and a sum equal to the balance thus resulting shall be paid, as herein provided, to the said railroad company, its successors or assigns, and to those having liens on the land, as their respective interests may appear. The amount due lien holders shall be evidenced either by the consent, in writing, of the railroad company or by a judgment of a court of competent jurisdiction in a suit to which the railroad company and the lien holders are parties. Payments shall be made from time to time, as the fund accumulates, by the Treasurer of the United States upon the order of the Secretary of the Interior: *Provided, however,* That if, upon the expiration of ten years from the approval of this Act, the proceeds derived from the sale of lands and timber are not sufficient to pay

the full amount which the said railroad company, its successors or assigns, are entitled to receive, the balance due shall be paid from the general funds in the Treasury of the United States, and an appropriation shall be made therefor. After the said railroad company, its successors or assigns, and the lien holders shall have been paid the amount to which they are entitled, as provided herein, an amount equal to that paid for accumulated taxes, as provided in section nine hereof, shall be deposited in the Treasury to the credit of the United States, thereafter all other moneys received from the sales of land and timber shall be distributed as follows:

A separate account shall be kept in the General Land Office of the sales of land and timber within each county in which any of said lands are situated, and, after deducting from the amount of the proceeds arising from such sales in each county a sum equal to that applied to pay the accrued taxes in that county and a sum equal to \$2.50 per acre for each acre of such land therein title to which is revested in the United States under this Act, twenty-five per centum of the remainder shall be paid to the State treasurer of the State in which the land is located, to be and become a part of the irreducible school fund of the State; twenty-five per centum shall be paid to the treasurer of the county for common schools, roads, highways, bridges, and port districts, to be apportioned by the county courts for the several purposes above named; forty per centum shall be paid into, reserved, and appropriated as a part of the fund created by the Act of Congress approved June seventeenth, nineteen hundred and two, known as the reclamation Act; ten per centum

shall become a part of the general fund in the Treasury of the United States; and of the balance remaining in said Oregon and California land grant fund from whatsoever source derived twenty-five per centum shall be paid to the State treasurer of the State in which the land is located, to be and become a part of the irreducible school fund of the State; twenty-five per centum shall be paid to the treasurer of the county for common schools, roads, highways, bridges, and port districts, to be apportioned by the county courts for the several purposes above named; and the remainder shall become a part of the general fund in the Treasury of the United States. The payments herein authorized shall be made to the treasurers of the States and counties, respectively, by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the close of each fiscal year during which the moneys were received: *Provided*, That none of the payments to the States and counties and to the reclamation fund in this section provided for shall be made until the amount due the Oregon and California Railroad Compny, its successors or assigns, has been fully paid, and the Treasury reimbursed for all taxes paid pursuant to the provisions of section nine of this Act.

SEC. 11. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect; and any person, applicant, purchaser, entryman, or witness who shall swear falsely in any affidavit or proceeding required hereunder or under the

regulations issued by the Secretary of the Interior shall be guilty of perjury and liable to the penalties prescribed therefor.

SEC. 12. That the sum of \$100,000 be, and the same is hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to complete the classification of the lands as herein provided, which amount shall be immediately available and shall remain available until such classification shall have been completed.

Approved, June 9, 1916.



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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

OREGON & CALIFORNIA RAILROAD COM- PANY ET AL., appellants, v. THE UNITED STATES.	}	No. 492.
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ON A CERTIFICATE FROM AND CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This court reversed the above entitled case and sent it back to the lower court with instructions to enter a decree in accordance with the court's opinion, which was embodied in the mandate. It also by necessary implication referred to Congress the disposition within stated limits of the land involved. For the purpose of this statement the pertinent parts of the opinion are:

This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants

by the railroad company, the lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion. (238 U. S. pp. 438-439.)

The decree entered by the trial court and the one proposed by the defendants are given below in parallel columns. What appears in the one but not in the other is italicized; thus is marked the difference between the two.

(Decree of the Court, title, attestation clause, and name of judge, omitted.)

In pursuance of the mandate of the Supreme Court of the United States, filed in this court on the 8th day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called "the defendants," be, and the same is hereby set aside, and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the "cross-complainants," and the interveners.

2. That the defendants and their respective officers and agents be, and each is hereby, enjoined from selling the lands or any part thereof granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler on the land sold to him, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding \$2.50 per acre: and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of

(Decree requested by appellants, title and attestation clause omitted.)

In pursuance of the mandate of the Supreme Court of the United States, filed in this court on the . . . day of December, 1915, in the above entitled cause, counsel for the respective parties being present, it is by the Court ordered, adjudged and decreed, as follows:

1. That the decree heretofore entered in said cause, so far as it affects the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, Union Trust Company, individually and as trustee, hereinafter called the "defendants," be, and the same is hereby set aside, and held for naught, but adhered to in all respects as to the defendants, and cross-complainants, hereinafter called the "cross-complainants," and the "interveners."

2. That the said defendants and their respective officers and agents be and each is hereby enjoined from selling the lands, or any part thereof, granted either by the Act of Congress approved July 25, 1866, as amended by the Act of Congress of April 10, 1869, or by the Act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two dollars and a half (\$2.50) per acre.

any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from *making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendant all the value that the said granting acts conferred upon the grantees.*

4. *That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the Court within*

3. That the *said* defendants and their respective officers and agents be, and each is hereby enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, *and* from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants, all the value the granting acts conferred upon the grantees;

but if Congress does not make such provision, the defendants may apply to this Court, within a reasonable time, not less than six (6) months from the entry of the decree

a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the Court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so.

5. That this decree shall apply not only to all said grant lands unsold at the time this action was instituted, but also to all such grant lands sold prior to the institution of the action which have since reverted or shall hereafter revert to the defendants or any one of them.

6. That this decree shall be without prejudice to any other suits, rights, or remedies which the Government may have by law or under the Joint Resolution of Congress passed April 30, 1908, or under the Act of Congress passed August 30, 1912, against the defendants or any of them.

7. That the complainant have and recover from the defendants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and each of them, its lawful costs and disbursements herein, taxed at \$6,249.02, and that execution issue therefor.

herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act.

Assignments of error were filed by the defendants in which they complained of the decree generally, although it contains much that was requested by them. Many of the assignments relate to questions that had been decided by this court adversely to the defendants. In due time defendants appealed to the Circuit Court of Appeals, which certified cer-

tain questions to this court. Afterwards, upon the application of the Government, the appellants consenting, this court ordered up the entire case for final disposition.

Congress, pursuing what it believed to be its duty under the opinion of reversal, passed the act approved June 9, 1916 (Chamberlain-Ferris Act, 39 Stat. 218, ch. 137), for the purpose of providing for the disposition of the land involved in the action "and at the same time secure[ing] to the defendants all the value the granting acts conferred upon the railroads" (238 U. S. 439).

Two general questions are presented for decision.

First, is the decree of the lower court in harmony with the mandate, and,

Second, is the Chamberlain-Ferris Act a proper exercise of power by Congress?

ARGUMENT.

I.

THE DECREE OF THE LOWER COURT IS IN EXACT HARMONY WITH THE MANDATE.

A. SECTION 1 IS VALID.

The first paragraph of the decree differs from the corresponding paragraph of the one proposed by the defendants only in the use of the italicized word "is," but the meaning of both is the same.

B. SECTION 2 IS VALID.

- (1) **AN ACTUAL SETTLER IS ONE WHO HAS ESTABLISHED AN HABITATION ON THE LAND PURCHASED.**

In paragraph two of the decree the italicized words "on the lands sold him" are objected to. Clearly the actual settler referred to in the restrictive provisos of the granting acts (16 Stat. 47, 94) declaring that the lands shall be sold only "to actual settlers" is an actual settler on the identical land sold, not on some other lands. Any other interpretation is utterly untenable. The trial judge said that "There could be no actual settler until an actual habitation was established upon some specific parcel of this land," and this court approved his view. (238 U. S. 434.)

- (2) **THE WORD "LANDS" HAS THE SAME MEANING IN THE RESTRICTIVE PROVISO AS IT HAS IN THE GRANTING CLAUSES OF THE GRANTING ACTS.**

The next objection to the same paragraph is predicated upon the conception that the word "land" or "lands," as employed in the granting acts (14 Stat. 239; 16 Stat. 47; 16 Stat. 94) and the opinion of this court interpreting them (238 U. S. 393) does not comprehend within its meaning timber growing on the lands or minerals therein. In other words, that the provisos in the granting acts forbidding the sale of the "lands" except "to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre" (16 Stat. 47), apply to the surface alone, and that appellants are free to sell the timber and mineral apart from the surface

for any price they choose and to any person in any quantity they may select, irrespective of whether the purchaser is an actual settler or not.

This position is revealed in the 15th assignment of errors, as well as in other places, where it is stated, "the court erred in not holding * * * that the railroad company * * * had the right to sell, cut, remove, or authorize the cutting or removal of the timber thereon, and the court erred similarly in not so holding * * * with reference to any mineral or other deposits in or products out of said lands" (Record this appeal, p. 32). The same contention is given much importance in their briefs.

Is it correct? The granting clause of the act of 1866 says, "That there be, and hereby is, granted to the said companies * * * every alternate section of public *land*." (Sec. 2.) In the restrictive proviso of the act of 1869, which is amendatory of the act of 1866, we read, "that the *lands* granted by the act aforesaid (meaning the act of 1866) shall be sold to actual settlers," etc. Section 1 of the act of 1870 conveys "each alternate section of the public *lands*," while in section 4 it is said "That the said alternate sections of *land* granted by this act [with some exceptions immaterial here] shall be sold by the company only to actual settlers." (14 and 16 Stat. *supra*, 7.) [*Italics ours.*]

Obviously the word is used in exactly the same sense in the provisos as in the granting clauses. This being so, unless it is broad enough in the former to embrace the minerals and timber, it was not broad enough in the latter to convey to appellants title

to the timber or minerals. Consequently they must either concede that the word "lands" in the provisos embraces the timber and minerals or else that they have no title to them. If they have no title, they have of course no ground for complaint as to the disposition made of them in the decree.

Appellants' position as we apprehend it is that if A is granted a piece of land under the condition that he shall sell it at a price not to exceed \$2.50 an acre, he can separate its elements into three parts, the timber, the minerals, and the surface, and sell the timber for as much as he can get, the minerals for as high a price as he can obtain, and the surface for a price not to exceed \$2.50 per acre, and thus comply with his contract. In other words, that he satisfies his obligation by observing the restriction as to one part of the property and disregarding as to two other parts. This will not do. (*Infra* p. 40.)

(3) "LAND" ORDINARILY COMPREHENDS NOT ONLY THE SURFACE, BUT ALSO THE TIMBER GROWING ON IT AND MINERALS BENEATH IT.

Washburn says:

Land is always regarded as real property, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that *cujus est solum, ejus est usque ad coelum* in one direction, and *usque ad Orcum* in the other (vol. 1, p. 3).

In *Higgins Oil & Fuel Co. et al. v. Snow et al.* (113 Fed. 433, Circuit Court of Appeals for the Fifth Circuit) it was contended that a life tenant of land was not entitled to any interest in the oil produced

therefrom, "her estate being limited to the surface." Answering this, the court said:

The life estate is given, not in surface of the land, but in the land as land, and it is elementary that the land itself in legal contemplation extends from the sky to the depths (p. 438).

"Land" includes earth, waters, and every natural condition, including minerals and growing trees. (Coke Litt. 4a; 2 Bl. Comm. 16-18; *Philadelphia Trust, etc. Co. v. Merchantville*, 74 N. J. Eq. 330; *State v. Jones*, 143 Ia. 398; *Green Bay & M. Canal Co. v. Telulah Paper Co.*, 140 Wis. 417; *Kinsley v. Holbrook*, 45 N. H. 313.)

The restrictive provisos therefore apply with equal force to the timber and minerals as to the surface of the ground.

(4) TO EXCLUDE BY CONSTRUCTION THE TIMBER AND MINERALS FROM THE OPERATION OF THE RESTRICTIVE CONDITIONS WOULD DEFEAT THE LATTER.

That Congress intended the lands should be sold to actual settlers only in quantities not to exceed 160 acres to one person and for a price not exceeding \$2.50 per acre, is definitely settled by the decision of this court. We take the following excerpts from its opinion:

"The sales are to be made only to certain persons and *not exceeding* a specified maximum in quantities and *prices*." The language of the provisos "certainly imposes an obligation not to violate the limitations and prohibitions when sales were made" (238 U. S. 421). "But neither the provisos nor the other parts of the granting acts make a distinction between the

lands, and *we are unable* to do so. The language of the grants and of the limitations upon them is general. We *can not* attach *exceptions* to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we can not import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered that the acts are *laws* as well as grants and *must be* given the exactness of laws." (Id. 422.) "We agree with the Government that the company * * * might sell for any price *not exceeding \$2.50 an acre.*" (Id. 434.) "Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants but as laws and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so." (Id. 435.) "We can only enforce the provisos *as written*, not relieve from them." (Id. 436.) [*Italics ours.*]

Undoubtedly the provisions just quoted make it very clear that according to this court's opinion the maximum amount which Congress intended the railroad to receive out of the grants is \$2.50 per acre. In no place is there warrant for any other conclusion. "The sales are to be made * * * not exceeding a specified maximum in quantities and prices," "we can not attach exceptions to it" (the language of the proviso), the company can sell for any price "not exceeding \$2.50 an acre," embody thoughts iterated and reiterated throughout the

opinion. If, however, the position of the defendants that the timber and minerals may be sold by the railroad company apart from the lands and without any regard to the restrictive provisos be correct, the railroad would receive a great deal more than \$2.50 per acre as the following discloses:

The record on the former hearing shows a stipulation by the parties that the value of the 2,300,000 acres involved in this suit "exceeds the sum of \$30,000,000." (Statement case for Govt. former hearing, p. 83.) That number of acres at \$2.50 an acre would amount to \$5,750,000, leaving a balance of \$24,250,000. Assuming that this balance represents the value of the timber and minerals, and it is not far from it, the railroad company would receive upon their theory \$24,250,000 in addition to \$2.50 an acre. No ingenuity can torture from the grants as construed by this court any warrant for a result so extraordinary.

(5) ACCORDING TO THE DECISION OF THIS COURT THE TIMBER AND MINERALS ARE A PART OF THE LANDS.

In the opinion this court said :

The lands invite now more to speculation than to settlement, and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever *or of the timber thereon* and from cutting or authorizing the cutting or removal of any of the timber thereon, etc. (238 U. S., 438). [Italics ours.]

This means that the timber is subject to the restrictive provisos. If not, why forbid its disposition? There is no authority for doing so unless the provisos are applicable. Yet the word "timber" does not occur in either of them. The prohibition, then, must rest on the theory that the term "land" is to be taken in its usual sense, and since the restrictions relate to it, they must of necessity bear on all its component parts, including timber and minerals.

A similar view of this court's opinion was taken by the United States Circuit Court of Appeals for the Ninth Circuit in *Southern Oregon Company v. United States*, decided February 13, 1917, but not yet published. That case involved the construction of a grant made March 3, 1869 (15 Stat. 340) to the State of Oregon which provided among other things that the lands "shall be sold to any one person only in quantities not greater than one quarter section and for a price not exceeding \$2.50 per acre." The grant was subsequently conveyed to the Coos Bay Wagon Road Company subject to all the conditions embodied in the granting act. This was in accordance with section 2 of the act. The Wagon Road Company disposed of the land in violation of the restrictive proviso, the title passing through many grantees until it found lodgment in the appellant, Southern Oregon Company. Suit was brought by the Government asking for similar relief to that for which it prayed in this case. The decree of the lower court was, so far

as applicable, in substantially the same terms as the decree in this case. The court of appeals, consisting of Gilbert, Ross, and Hunt, circuit judges, filed two opinions, one by Judge Gilbert and a concurring opinion by Judges Ross and Hunt. Both opinions are based upon the decision of this court in the case at bar, and unite in affirming the decree of the lower court. In the concurring opinion it is recited that the lower court refused a decree of forfeiture of the land—

but enjoined the defendant, its officers and agents, from selling or making any disposition thereof, or of the *timber, materials*, or other deposits thereon or therein "until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, mineral, or other deposits in accordance with such policy as Congress may deem fitting under the circumstances, and at the same time secure to the defendant all the value that the granting act conferred upon the state of Oregon or the Wagon Road Company," with a provision to the effect that should Congress fail to act in the premises within a stated period the defendant might apply to the court for a modification of the decree, the court reserving jurisdiction for that purpose. The main basis of the court's ruling, as appears from its opinion, was the decision of the Supreme Court in the case of *Oregon & California R. R. v. United States*, 238 U. S. 393. A careful examination of the *opinion* in that case satisfied us that its doctrine, applied to the facts of the present case,

authorized and required the decree that was entered by the court below, which was permissible under the prayer for general relief. (Italics ours.)

(6) THIS COURT HAVING DECIDED THAT THE RESTRICTIVE PROVISIONS RELATE TO THE TIMBER AND MINERALS AS WELL AS THE SURFACE, THE QUESTION IS RES JUDICATA.

Assuming, without conceding, that the applicability of the covenants to the timber and minerals was not presented by defendants on the former hearing, may they do so now?

In *Nesbit v. Riverside Independent District*, 144 U. S. 610, it was said that (618):

When the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was *or might* have been presented and determined in the first action.

In *Dowell v. Applegate*, 152 U. S. 327, speaking of the effect of a former decree, it was said (343):

And that decree, never having been modified by the court that rendered it nor by this court upon appeal, necessarily concludes *every matter* that Daniel W. Applegate *was entitled*, under the pleadings, to bring forward in order to prevent the sale of the lands claimed by him, by whatever title.

In *Northern Pacific R. Co. v. Slaght*, 205 U. S. 122, 130-131, we read:

The general rule of the extent of the bar is not only what was pleaded or litigated, but what *could* have been pleaded or *litigated* (Italics in each case ours.)

(To the same effect are *Cromwell v. County of Sac*, 4 Otto 351, and *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252.)

The case when here before turned chiefly on the meaning of the restrictive covenants. Union Trust Company sought to limit them "to lands susceptible of cultivation," and to exclude from their scope "timberlands" (its brief, p. 103); while the railroad company and Gage urged that because (as they alleged) the lands were unfit for settlement the covenants did not apply (their brief point 21, p. IV). There were, of course, other contentions touching the same subject. But the foregoing is sufficient to illustrate the point we make, which is that since the scope of the covenants was properly under discussion at that time, if defendants failed to advance all that might have been said on the subject, they can not supplement their argument now. The matter is irrevocably decided. (*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 255.)

C. SECTION 3 IS VALID.

The objection to this section, so far as it forbids the removal of mineral, is unsound for the same reason, as a like objection to a similar prohibition in section two, just considered.

The only difference between the section proposed by defendants and this section, except some immaterial verbal ones, consists of the circumstance that, in addition to restraining the disposition of the lands, it forbids the withdrawal of certain moneys on deposit

in Portland banks. This money was derived from the land after the first decree had been entered, and by direction of the trial court was placed on deposit to await the final outcome of the suit. A large part of it represents the proceeds of a sale of timber ordered by the court and takes the place of the timber. It is subject, we say, to the same disposition by Congress as the timber would be if the latter had not been removed.

D. SECTION 4 IS VALID.

The last 11 lines of section 3 of the decree proposed by the defendants does not differ materially from section 4 of the decree entered by the court, save that the latter recognizes the right of Congress to dispose of the money, timber, minerals, or other deposits, and reserves to the court the right to modify for good cause the temporary injunction granted. We have sufficiently discussed the power of the court to restrain the disposition of the timber and minerals as well as the other part of the lands. The part reserving to the court the power to modify the temporary injunction for good cause is in clear accord with the opinion, but what was proposed by the defendants is not. The opinion says: "And the court in its discretion may modify the decree accordingly." (238 U. S., 439.) The decree provides: "The court reserves the right to modify the decree if in its opinion good cause shall then exist for doing so." There is no substantial difference between the opinion and the decree.

E. SECTION 5 IS VALID.

Clearly the purpose of the opinion was to authorize and require the application of both the permanent and temporary injunctions provided for to all the unsold lands. It says the defendants shall "be enjoined from sales in violation of the covenants" (238 U. S., 438). No warrant anywhere for the thought that the railroad company could in the future legally violate the covenants with respect to any of the grant lands whether they were included in the suit or not. The relief sought and granted are permanent as to all such land.

The only part of the grants excluded from the suit was that which the railroad company had sold (238 U. S., pp. 436-437), and all lands covered by executory contracts of sale were treated as sold. (Statement, case for Govt., former hearing, p. 28.) It was the purpose of the bill to reach all lands in which third parties had or claimed *no* interest by way of contract with the railroad company. The bill was so construed by the lower court and all the parties, for the first decree includes, as this one does, all lands which had reverted at the date of the decree or which might thereafter revert to the company. (Old Record VIII, p. 1301, sec. 3, sub. d.) To this no objection was made in any of the briefs or oral arguments. Even if reverted lands are not covered, no prejudice can result to defendants, because the judgment in this suit as to the meaning of the covenants would be binding on them in any suit hereafter brought by the Government to affect

those lands. The subject and the parties would be the same, and defendants would not be heard to say in such a suit that this judgment is wrong in any respect. (*Cromwell v. Sac County, supra; Nesbit v. Riverside Independent District, supra; Dowell v. Applegate, supra; Northern Pacific R. Co. v. Slaght, supra; Virginia-Carolina Chemical Co. v. Kirven, supra.*)

F. SECTION 6 IS VALID.

This provision is authorized by that part of the opinion which says, in effect, that the decree shall be without prejudice to any other suits which the Government may have with respect to the granted lands (*Id.*, 437).

G. WHY THE LOWER COURT DEEMED IT NECESSARY TO SPECIFICALLY MENTION TIMBER AND MINERALS AND TO PROHIBIT THEIR DISPOSITION EXCEPT AS A PART OF AND IN CONJUNCTION WITH THE AREA CONTAINING THEM.

The railroad companies and Gage, after the opinion had been handed down, but before the decree of the lower court was entered, served upon the Government a paper entitled a "Petition * * * for modification of opinion rendered." In this they argued that under the grants they were "authorized to remove stone from the lands and use it to build a railroad bridge or a station house, or * * * farm a patch of arable area and turn the farm products into money" and then said:

If all this be true there is no reason apparent to us upon the face and terms of the statute why the right of the grantee in a like way to

make use of the timber upon the lands should be differentiated (p. 8):

Again:

But the removal of the timber upon this land would not go in defeat of the settlement policy of the act, but would be directly in aid of such policy (p. 9).

The Government believed that the defendants, holding these views, might attempt to remove the timber from the lands without regard to the restrictive clauses even after Congress had acted. If they did, the Government undoubtedly would feel constrained to commence proceedings to enjoin them. To save the necessity of this, as well as the costs and delays attendant upon it, the Government asked the lower court to make the decree so specific that there could be no doubt in the minds of the defendants or anybody else concerning its meaning.

H. WHEN THE TRIAL COURT ASSESSED COSTS AGAINST THE DEFENDANTS IT WAS ACTING WITHIN ITS POWER UNDER THE MANDATE.

The mandate directs a general reversal of the lower court's decree. This put the case where it was before the decree had been entered. Thereupon the lower court, in obedience to the mandate, entered a new decree in favor of the complainant and against the defendants upon the record as it had been made.

Suppose the trial court in the first instance, instead of entering a decree declaring a forfeiture, had entered such a decree as the mandate required, would there be any doubt about the complainant's right to costs?

Surely not. It had prevailed, and the prevailing party is always entitled to recover his costs unless there be some special reason appealing to the sound discretion of the court for not allowing them.

In *Tyler Min. Co. v. Sweeney*, 79 Fed. 277, the court said (281):

In equity cases and in other cases where there are no statutory provisions or rules of practice, the award of costs, as well as the taxation thereof, rests in the sound discretion of the trial court, and will not be reviewed in the appellate court, except in cases of a manifest abuse of such discretion.

This discretion, of course, is judicial, not arbitrary. Is there any reason in this case why the appellants should not be compelled to pay the complainant its costs? The illegal action of the defendants forced the complainant to go into court for relief. It plead the granting acts—the law—and showed that they had been violated by the defendants. This the latter denied. In consequence of the denial much testimony was taken. The court found that the granting acts had been violated, that the railroad company was guilty of a “prolonged disregard of the covenants.” Where, then, is there any equitable cause for relieving the lawbreaker from the consequence of its acts?

Appellants place themselves on the proposition that this court did not order them to pay costs. Neither did it make *any* order with respect to them. Yet it was necessary for the lower court to pass some

order relative to the payment of the costs. A vast amount of testimony had been taken before a stenographer—examiner—appointed by the court. His fees had to be paid. Equity rule 50 provides that such fees shall be taxed “ultimately as costs;” but to which party? That of course is for the court. Without some order with respect to the costs the record would be incomplete. Therefore we say that when this court directed the lower court to enter a decree in accordance with the opinion it impliedly directed that the court award costs in accordance with the usual rules of equity. Hence the court was within its rights in directing that the losing parties should pay the costs.

Were the defendants the losing parties? It is true the Government was defeated in its contention that the restrictive provisos constituted conditions subsequent, but so were the defendants defeated in their position that these provisos were only “unenforceable covenants” (238 U. S., 412). That the Government was successful in the main is made evident by these facts: The value of the land “exceeds thirty millions,” according to our stipulation. The Government claimed all. So did the railroad companies. By the judgment of the court the railroad is entitled to a maximum of \$2.50 per acre only, or \$5,750,000 for the 2,300,000 acres involved. Deduct this sum from the total value of thirty millions and there results a remainder of \$24,250,000 which, by the judgment of the court, goes to the Government. To

that extent the Government was successful, and hence, as we have just observed, is entitled to its costs.

II.

THE CHAMBERLAIN-FERRIS ACT IS A PROPER EXERCISE OF POWER BY CONGRESS.

A. CONGRESS HAD POWER TO REVEST THE TITLE.

In the opinion and mandate the court directed that the defendants be—

enjoined from any disposition of them (the lands) whatever or of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, *until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.*" (238 U. S. *supra*, 438-439.) [Italics ours.]

Congress understood this to mean that in the judgment of the court it had power to dispose of the lands in question in any way that it might see fit, subject only to the one condition, namely, that it secure to the defendants "all the value that the granting acts conferred upon the railroads."

To be sure, the court did not say specifically that Congress had power to make disposition of the lands, but this is necessarily implied in what it did say. The court's action is open to no other meaning. Surely the court did not refer to Congress the *disposi-*

tion of the lands without holding at the same time that Congress had the power to make the disposition.

Webster's Dictionary says that "to dispose of" means "to part with; to relinquish; to get rid of; as, to dispose of a house."

In *Phelps v. Harris*, 101 U. S. 370, 380-381, we read:

The expression "to dispose of" is very broad, and signifies more than "to sell." Selling is but one mode of disposing of property.
* * * Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with, and the lands received would be the proceeds.

(See also *Hill v. Sumner*, 132 U. S. 118; *United States v. Gratiot*, 14 Pet. 526; *King v. Ackerman*, 2 Black 408; *Woodbridge v. Jones*, 103 Mass. 549; *Beard v. Knox*, 5 Cal. 252; *Williams, lessee, v. Veatch*, 17 Ohio 171; *Pearre & Co. v. Hawkins*, 62 Tex. 434.)

The power to dispose of the lands implies the power to do all things necessary to the full exercise of that power. (*McCulloch v. Maryland*, 4 Wheat. 315, 409.) This is axiomatic.

Therefore, Congress must have had the power to revest title in the Government, for without the title the Government could not make "disposition" of the lands.

An additional reason for this is found in the fact that what is to be secured to the railroad company under the opinion is the "value"—not the rights—conferred by the grants. In other words, Congress had authority according to the opinion to take the rights and pay their "value." Congress so interpreted the court's opinion, and in consequence passed the Ferris Act.

It is not, of course, for us to attempt to defend the decision of this court to the effect that Congress had power to revest the title. To do so would be an impertinence. Besides, it needs no defense. It is the law of the case and binding irrevocably upon all—the Government and appellants alike.

1. POWER RESERVED IN THE ACT OF 1866.

But if defense were necessary it is at hand. The act of 1866 reserved to Congress the power to amend it at any time "having due regard for the rights" of the railroad companies. (Sec. 12.)

This is sufficient authority for the passage of the Chamberlain-Ferris Act so far as it affects the lands granted by the act of 1866, and most of those here involved—all but 53,000 of the 2,300,000 acres—were granted by that act. Congress had that power in mind when it passed the Chamberlain-Ferris Act. (Preamble to act, 39 Stat., par. 4, p. 218.)

Appellants take issue with this proposition and say that the power reserved was not broad enough to warrant a revestment of the title. In support of this position several authorities are brought forward;

none of them sustain it. Take, for instance, the opinion in the Sinking Fund Cases (99 U. S. 700). The court, speaking of such a reservation as we have here, said (720):

Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power.

And quotes with approval from other decisions of this court the following:

It may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the *original purposes* of the grant; or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets.

Again, the power to amend may be exercised to protect the rights of the *public* and of the corporators, or to promote the due administration of the affairs of the corporation.

But (721)

the alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. (*Italics ours.*)

The power has been used in this case "to carry into effect the original purposes of the grant" and "to protect the rights of the public."

There is nothing to the contrary in the other cases cited by appellants. Therefore, we pass them without further notice.

2. POWER OF EMINENT DOMAIN.

The Chamberlain-Ferris Act may also be justified as a legitimate exercise of the power of eminent domain (*U. S. v. Jones*, 109 U. S., 513, 518). In taking the lands Congress was bent upon serving one of the public purposes for which the grants were made, namely, the settlement of the country (238 U. S. 417). The railroad company had unlawfully refused for almost 40 years to advance that purpose, and in consequence Congress recalled the title to the end that it might achieve what the railroad company had refused to do.

In addition, the proceeds of the sales of the lands are to go to purposes undoubtedly public—25 per cent for irreducible school fund; 25 per cent for common schools, roads, highways, bridges, and post districts; 40 per cent for reclamation purposes, and 10 per cent for general fund of the Treasury (Chamberlain-Ferris Act, 39 Stat., sec. 10, p. 222).

This court has decided (*United States v. Gettysburg Electric Railway*, 160 U. S. 668) that (681)—

When the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.

There was no formal declaration here that the purpose was public, but that, we apprehend, is not necessary when its character is evident, as in this case.

The value of the land to the railroad company under the granting acts was appraised by this court when the case was here before—an action to which appellants were parties—and compensation according to the value thus fixed is *secured* by the Chamberlain-Ferris Act. No more is needed. (*Sweet v. Rechel*, 159 U. S. 380, 401; *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 658.)

3. EQUITY ALWAYS HAS POWER TO GRANT ADEQUATE RELIEF.

But apart from and entirely independent of this, the Chamberlain-Ferris Act is sustainable upon the ground that it is a part of the remedy given to the Government by the judgment of this court. It is rudimentary law that a court of equity always has the right to create any remedy it may think necessary for the purpose of affording proper relief in any case.

The case of *Sharon v. Tucker*, 144 U. S. 533, quotes with approval the following (544-545):

It is absolutely impossible to enumerate all the special kinds of relief which may be granted or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations. (1 Pom. Eq. Jur., sec. 170.)

Bispham observes that:

This capacity of moulding a decree to suit the exact exigencies of a particular case is

indeed one of the most striking advantages which procedure in chancery enjoys over that at common law. (Bispham's Principles of Equity, sec. 7.)

In *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, Judge Van Devanter, speaking for the eighth circuit, quoted the following with approval (818):

The flexibility of decrees of a court of equity will enable it to meet every emergency.

(See also *Payne v. Hook*, 7 Wall. 425, 432, and *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 351, 361.)

In *Sage v. Central Railroad Co.*, 9 Otto 334, it was said (342):

The specific relief sought was a strict foreclosure; but under the prayer for general relief it is not questioned that the decree for a sale was appropriate.

One of the prayers of the bill in the case at bar was for general relief. There was also a prayer for the sale of the lands. (Statement case for Govt., former hearing, p. 34-35.)

The adaptability of decrees in equity to the particular facts of a case is touched upon in the opinion herein (238 U. S. 422).

The railroad company had violated with impunity its contracts—the grants—with the Government. From the very beginning it paid no attention to the restrictive provisos thereof. (Statement case for Govt., former hearing, p. 88.) The court found that

it had been guilty of "prolonged disregard of the covenants" (238 U. S. 438) and that an injunction against violations of them in the future would not be enough. What then? Having power to fit the relief to the situation, did it not have power to refer the disposition of the lands to Congress, with the admonition that if the latter made disposition of them it must secure to the defendants "all the value the granting acts conferred upon the railroads."

It seems to be the argument of the appellants that although the railroad company was guilty of a "prolonged disregard of the covenants," and that restraint from future violations would not be enough (238 U. S. 438), still there was no power anywhere to do more than restrain the company from such violations; that neither the title nor the possession of the company could be disturbed; that if it was good in the future, its past delinquencies with all their baneful consequences must be forgotten, or at least that there was no power in the courts to grant the Government any other relief. Why should this be so? Are not other corporations amenable to the law for their breaches of contract? Then, why not this one? "Upon what meat doth this" corporation feed that it "has grown so great" as to be free from the consequences of its illegal conduct? Is the court impotent to grant any relief except that which harmonizes with the company's will? May it not coerce the company into law obedience by any means which it adjudges proper?

The contract breached in this case is different from those which appear in most other cases, be-

cause it is not only a contract, but also a law. (238 U. S. 432.) Adequate relief, in the judgment of the court, required a change in that law. For instance, it would not do to sell 160 acres at \$2.50 an acre—\$400—which are worth, because of the timber on them, \$18,000. To do this, said the court, would invite “more to speculation than to settlement” (238 U. S. 438), but none the less it would have to be done unless the law could be altered. Consequently the matter was referred to Congress, the only body having power to make the change, and through whose assistance alone the secondary and only remaining purpose of the grants—settlement—could be carried out at this time. If this puts the appellants in a situation they do not like, it is because the railroad company failed to keep its contract and obey the law.

But, however all that may be, the decision of this court, as we have heretofore observed, that Congress had the power to dispose of the lands and hence to revest the title in the Government, is not open for examination here—it is conclusive.

**B. APPELLANTS HAVE NO CAUSE FOR COMPLAINT AGAINST
THE ACT.**

For nearly forty years prior to the commencement of this action, the railroad company had ignored its contracts with the Government (238 U. S. pp. 425, 438). It is not in a position to insist that those contracts shall not now be disturbed even though its violation of them renders their disturbance necessary in order that the rights of the other contracting

party—the Government—be protected. Especially is this so since all the railroad company's interest under the contracts—the grants—as found by this court, are adequately preserved in the Chamberlain-Ferris Act, as we shall presently show.

C. THE CHAMBERLAIN-FERRIS ACT SECURES TO THE APPELLANTS "ALL THE VALUE" CONFERRED BY THE GRANTING ACTS UPON THE RAILROADS.

It consists of a preamble and 12 sections. In the former, reference is made to the Granting Acts; the restrictive covenants and the violations of them; the decision of this court referring the disposition of the lands to Congress; the power of amendment reserved in the granting act of 1866 (sec. 12); the receipt by the railroad of large sums of money from sales of the land, leases, interest, contracts, etc., in excess of \$2.50 per acre; and the terms of the grants fixing the maximum price at \$2.50 per acre. Only sections 1, 7, 8, 9, and part of 10 relate to the interest of the railroad company. The others deal with the handling of the lands after the title thereto has been revested in the Government, and are immaterial here.

The first-mentioned sections read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to so much of the lands granted by the Act of July twenty-fifth, eighteen hundred and sixty-six, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," as amended

by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, and to so much of the lands granted by the Act of May fourth, eighteen hundred and seventy, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, as had not been sold by the Oregon and California Railroad Company prior to July first, nineteen hundred and thirteen, be, and the same is hereby, revested in the United States: *Provided*, That the provisions of this Act shall not apply to the right of way to the extent of one hundred feet in width on each side of the railroad and all lands in actual use by said railroad company on December ninth, nineteen hundred and fifteen, for depots, side tracks, wood yards, and standing grounds.

SEC. 7. That the Attorney General of the United States be, and he is hereby, authorized and directed to institute and prosecute any and all suits in equity and actions at law against the Oregon and California Railroad Company, and any other proper party which he may deem appropriate, to have determined the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of

said granted lands, whether sold or unsold, patented or unpatented, and which should be charged against it as a part of the "full value" secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court. In making this determination the court shall take into consideration and give due and proper legal effect to all receipts of money from sales of land or timber, forfeited contracts, rent, timber depredations, and interest on contracts, or from any other source relating to said lands; also to the value of timber taken from said lands and used by said grantees or their successor or successors. In making this determination in the aforementioned suit or suits the court shall also determine, on the application of the Attorney General, the amount of the taxes on said lands paid by the United States, as provided in this Act, and which should in law have been paid by the said Oregon and California Railroad Company, and the amount thus determined shall be treated as money received by said railroad company.

SEC. 8. That the title to all money arising out of said grant lands and now on deposit to await the final outcome of said suit commenced by the United States in pursuance of said joint resolution of nineteen hundred and eight is hereby vested in the United States, and the United States is subrogated to all the rights and remedies of the obligee or obligees, and especially of Louis L. Sharp as commissioner, under any contract for the purchase of timber on the grant lands.

SEC. 9. That the taxes accrued and now unpaid on the lands revested in the United States, whether situate in the State of Oregon or State of Washington, shall be paid by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the approval of this Act, and a sum sufficient to make such payment is hereby appropriated, out of any money in the Treasury not otherwise appropriated.

SEC. 10. That all moneys received from or on account of said lands and timber under the provisions of this Act shall be deposited in the Treasury of the United States in a special fund, to be designated "The Oregon and California land-grant fund," which fund shall be disposed of in the following manner: The Secretary of the Interior shall ascertain as soon as may be the exact number of acres of said lands, sold or unsold, patented to the Oregon and California Railroad Company, or its predecessors, and the number of acres of unpatented lands which said railroad company is entitled to receive under the terms of said grants, and the value of said lands at \$2.50 per acre. From the sum thus ascertained he shall deduct the amount already received by the said railroad company and its predecessors in interest on account of said lands, and which should be charged against it as determined under section seven of this Act; and a sum equal to the balance thus resulting shall be paid, as herein provided, to the said railroad company, its successors or assigns, and to those having liens on the land, as their re-

spective interests may appear. The amount due lien holders shall be evidenced either by the consent, in writing, of the railroad company or by a judgment of a court of competent jurisdiction in a suit to which the railroad company and the lien holders are parties. Payments shall be made from time to time, as the fund accumulates, by the Treasurer of the United States upon the order of the Secretary of the Interior: *Provided, however, That* if, upon the expiration of ten years from the approval of this Act, the proceeds derived from the sale of lands and timber are not sufficient to pay the full amount which the said railroad company, its successors or assigns, are entitled to receive, the balance due shall be paid from the general funds in the Treasury of the United States, and an appropriation shall be made therefor. After the said railroad company, its successors or assigns, and the lien holders, shall have been paid the amount to which they are entitled, as provided herein, an amount equal to that paid for accumulated taxes, as provided in section nine hereof, shall be deposited in the Treasury to the credit of the United States; thereafter all other moneys received from the sales of land and timber shall be distributed as follows: (Remainder of section not material here.) (39 Stat., 218.)

A word of explanation with regard to these sections, except the first and tenth which need none.

The railroad company has sold about 800,000 acres, the proceeds of which, together with moneys derived from other sources connected with the

grants, reach about \$5,506,870.97, or \$3,506,870.97 more than the company would be entitled to at \$2.50 an acre (statement, case for Govt. former hearing, p. 83).

Under section 9 the Government is to pay to Oregon and Washington the taxes due on the lands, totaling about \$1,300,000. Whether the excess over \$2.50 an acre received by the railroad company, as just stated, constitutes, in the words of the opinion, an "illegal emolument" (238 U. S. p. 436) and should be deducted, together with the taxes paid, from what would otherwise be coming to the railroad company in the Government's settlement with it, are questions referred to the courts by section 7.

The money mentioned in section 8 is the same as that mentioned in section 3 of the decree. Its relation to the granted lands is shown in the discussion with respect to that part of the decree. (*Supra*, p. 16.)

Stated otherwise, the act revests the title in the United States to all the unsold lands and provides for the payment to the railroad company within ten years of the balance that may be coming to it on a basis of \$2.50 an acre for the total acreage covered by the two grants after making all proper deductions. Thus the railroad company is assured the *maximum* amount—\$2.50 per acre—which under any circumstances, no matter how favorable, it would be entitled to receive under the grants as construed by this court. This is far more than it could possibly receive if it sold the lands under the terms of the restrictive

provisos. In such case it could receive no more, as we have just said, than \$2.50 an acre; but in many cases it would not obtain that sum or even a fair share of it. This is so because considerable of the land is without merchantable timber and is also uncultivable. The appellants urged in effect at the former hearing that a great deal of it "was nothing but a wilderness of mountain and rock" (238 U. S. p. 422). While we do not admit this contention to its full extent, we must concede that it is true in part. In providing, therefore, that the railroad company shall receive \$2.50 per acre for all the land, whether good or bad, Congress has been more than just—it has been very generous.

Payment of the amount due the railroad company is amply secured. Section ten says that payments shall be made from time to time as the funds accumulate and if after the expiration of ten years the proceeds from the sales are not sufficient to discharge the full amount due, the balance shall be paid out of the general funds in the Treasury. The railroad company has no ground for complaint here. In a little more than ten years, it is assured of all the money rightfully coming to it, and in the meantime it is free from any obligation to pay taxes. It is safe to say that in this way it will receive not only more money by far, but will receive it much sooner, than if the Chamberlain-Ferris Act had not been enacted.

Did the granting acts confer upon the railroads any other "value" than that flowing from the right to sell the land for a sum not to exceed \$2.50 an acre, and if

so, is it secured to the appellants by the Chamberlain-Ferris Act? The granting act of 1866 gave to the railroad the right "to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof," also a right of way through the public lands "to the extent of one hundred feet in width on each side of said railroad * * * including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, sidetracks, turntables, water stations, or any other structures required in the construction and operating of said road" (Sec. 3, 14 Stat. 239, 240).

Like rights were conferred by the grant of 1870 upon the grantee (sec. 1, 16 Stat. 94).

The right to take materials from the public lands for constructing the road has, of course, been exhausted because the line of road contemplated by section 1 of each act has been built long since. Besides, the Chamberlain-Ferris Act does not disturb it. The rights of way, station grounds, etc., appropriated by the defendants from the granted lands are saved to them by the proviso to section 1 of the Chamberlain-Ferris Act, which reads:

That the provisions of this Act shall not apply to the rights of way to the extent of one hundred feet in width on each side of the railroad and all lands in actual use by said railroad company on December ninth, nineteen hundred and fifteen, for depots, sidetracks, wood yards, and standing grounds.

[December 9 was taken because it is the date of the decree now before the court for review.]

I. CERTAIN RIGHTS CLAIMED BY APPELLANTS.

There is, as we have noticed (*supra*, p. 8), a contention on the part of appellants that the railroad company had the right under the granting acts to cut the timber, or mine the coal, if there be any, and sell it irrespective of the provisos, or use it as fuel in its locomotives; that it also had the right to farm the land, sell the crops, and apply the proceeds on its debt; and that the Chamberlain-Ferris Act does not provide for the value of any of those rights. There are several answers at hand:

(a) The questions thus raised have become *res judicata* (*supra*, p. 15).

(b) The railroad company's charter does not authorize it to engage in farming, mining, or logging (R. Vol. I, p. 89, former hearing) and besides, there is no warrant in the granting acts, or the debates at the time they were enacted, for saying that Congress intended that the railroad company could put the lands to any such purpose.

(c) Even if the granting acts conferred those rights, they are, when judged by the conduct of the railroad company, of practically no value. During the long period of the company's ownership of the lands it had never mined a ton of coal, cultivated an acre of land, or used a piece of timber taken from the lands save only to the value of \$18,850.25. (Statement, Case, Govt., former hearing, p. 83.) And this small value

is more than compensated for in the \$2.50 an acre allowed by the Chamberlain-Ferris Act, for, as we have shown and the record amply discloses, there are thousands of acres for which the company could not receive any thing if their right to sell had not been disturbed by the Chamberlain-Ferris Act (*supra*, p. 37), because they are mountain sides, barren rocks, without timber, and uncultivable. For each such acre the Chamberlain-Ferris Act allows the company \$2.50. In this connection, let us repeat, that under the opinion of the court, Congress is not to secure rights, but "the value" of the rights, to the railroad company (238 U. S. 429).

(d) The purposes of the granting acts according to the interpretation of this court were two, namely (1) the building of the railroad, and (2) the settlement of the country. And "the secondary purpose," says the court "was regarded and provided for in the provisos under review. Both purposes must be considered. It may be that it was not expected that actual settlers would crowd into 'the vast unpeopled territory' but the existence of such settlers at some time must have been actually contemplated. Both purposes, we repeat, were to be subserved, and how to subserve them is the problem of the case." (238 U. S. *supra*, 417.) Again, referring to the granting acts, the court mentions "the accomplishment of their purposes—either of the construction of the road, or sale to actual settlers" (420). The secondary purpose, it is clear, would be defeated if the railroad company had the right to farm the land. Such a use would be

inconsistent with the idea of small tracts—160 acres—dotted with homes belonging to the occupants—"A bold peasantry their country's pride." This was the character of settlement which Congress contemplated, not an immense area owned by an absentee landlord and cultivated by a poor tenantry—the curse of older countries. It was to prevent just such a condition as that, that the restrictive provisos were adopted. This was shown in the former argument (brief, p. 42 et seq), which is noticed in the opinion of the court (414).

(e) According to appellants' witnesses, it would cost from \$50 to \$500 to clear the stumps from an acre of land. (Reduced summary of testimony attached to Government's statement of case, former hearing.) Uncleared land of that character would have no attractions for settlers—it would on the contrary repel settlement and thus defeat the secondary purpose of the grants. If, on the other hand, the land had not been denuded of its timber, the settler could sell the timber, and thus realize enough to clear the land and otherwise improve it.

But we deny that the railroad company had any right to farm, log, or mine the lands; it had no right to take anything from them save perhaps a right of way and depot grounds—which are preserved by the Chamberlain-Ferris Act. This view is not inconsistent with the finding of the court that "there was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed" (434)—

"limited only as prescribed," but "there's the rub." Nothing was contemplated which would collide with the limitations—the settlement provisos—and the claims we are now discussing would do so. Therefore, they must be rejected.

Finally, as we have before remarked, there is no authority in the railroad company to divide the lands into three parts—soil, mineral, and timber—and then free two from the burden of the limitations imposed by the restrictive provisos.

2. CASES CITED BY APPELLANTS.

Appellants, railroad company and Gage, cite a number of cases and argue at some length to the effect that a grantee of lands from the Government may dispose of them as he pleases, subject to such restrictions as the granting act imposes. These cases illustrate no point of controversy in the case at bar. *Schulenberg v. Harriman* (21 Wall. 44) and *Fletcher v. Peck* (6 Cranch, 87) may be taken as types of all the others. In the first case the grant was upon a condition subsequent. The condition was broken. After this had happened, and before any action was taken by the grantor to reenter and reclaim the title, Schulenberg, a stranger to the title, went upon the lands and cut therefrom some timber. The grantee through its agent, Harriman, seized the logs that Schulenberg had cut, and thereupon the latter sued to recover them through a replevin action. Thus was presented the question as to whether he or the grantee had title. The decision was, of course, that, since the grantor

had never taken any action to enforce the condition subsequent, the title to the land remained in the grantee, and, consequently, it had a title to the logs. "The title to the land remaining in the State" (the grantee), said this court, "the lumber cut upon the land belonged to the State." This is elementary law with respect to conditions subsequent. But what has it to do with the case at bar? Is it cited for the purpose of showing that title to the timber as well as to the surface of the land was, by virtue of the granting act, conveyed to the grantee? If so, we admit it. Of course, in such circumstances, the title to the timber passed to the grantee with the surface of the land, because it was a *part* of the land.

What we are here dealing with, however, is the remedy which the court has given the Government because the grantee railroad company had for nearly forty years violated its contracts—the granting acts—with the Government. "The play's the thing." And so here the remedy is the point of controlling interest. Where an execution has been issued upon a judgment rendered against a man for a breach of contract for the purchase of a tract of land, it is too late for him when opposing the execution of the writ to ask the court to reexamine the contract for the purpose of determining whether or not it had been breached. The same is true here. We have passed the stage when it was proper to consider whether the railroad company had violated its contract with the Government. This court has

adjudged that it had, and now we are dealing, as just observed, with the remedy awarded by the court.

Nor is there any question here, as in *Fletcher v. Peck* (*supra*, p. 43), of the right of Congress to recall a grant where there has been *no* breach of the contract upon which it was made. Here, as we have said, there was a breach and a grave one long persisted in. None of the cases cited is authority for the proposition that property may not be taken in satisfaction of a judgment rendered by a court of competent jurisdiction. Whether the taking is done through an act of Congress, or a sale by a master, or in any other way, can make no difference. The court, as we have shown (*supra*, p. 28), has a right to select the means most appropriate to the end in view—compensation for the breach.

3. THE UNION TRUST COMPANY.

In its brief this company seems to proceed upon the hypothesis that the contract between the Government and the railroad was faithfully kept by the latter. No account whatever is taken of the important fact that for nearly forty years that contract was in large part utterly ignored. A stranger to the record reading the brief would be led to conclude that the malefactor in the case was the Government, not the railroad company. Of course, starting from such a premise the conclusion must be erroneous. The rights of the Trust Company are measured by those of the railroad company. They can be no greater. This court said in the

opinion under review that the railroad company might choose the grants as a means of credit—

subject ultimately to the restrictions imposed; we say “restrictions imposed” to *reject* the contention of the railroad company that an implication of the power to mortgage the lands carries a *right* to sell on foreclosure *divested* of the *obligations* of the *provisos*. (238 U. S. *supra*, 435.) (Italics ours.)

The Trust Company, and also the railroad company, seem to overlook this statement. After enumerating certain pertinent facts, the court said (438):

This, then, being the situation resulting from conditions now existing incident, it may be, to the prolonged disregard of the covenants by the railroad company the lands invite now more to speculation than to settlement.

In other words, the railroad company, by its many breaches of the contract between it and the Government, had brought about a condition of things which tended to prevent the accomplishment of the second purpose of the grants, namely, settlement of the country. This being so, an adequate remedy required the interposition of Congress, and so the court decreed. Neither the railroad company, therefore, nor the trust company, is in a position to complain of the consequence which the conduct of the former has brought upon both.

Moreover, the trust company fails to attach any significance, apparently, to that all-important part of the judgment of this court, in which it says, in effect, that defendants shall be restrained—

until Congress shall have a reasonable opportunity to provide by legislation for their (the lands) disposition in accordance with such policy as it *may deem fitting* under the circumstances (238 U. S., *supra*, 438). (Italics ours.)

These words have weighty meaning and can not be ignored. It is largely upon their import the case must turn.

(NOTE.—The trust company has ample security outside of the lands in question. Government's Brief, former hearing, p. 183.)

4. "UNCOMPENSATED SERVICES."

Again and again appellants speak of the "uncompensated services rendered and to be rendered by the railroad company through all the years in transporting Government troops and materials." While this, like many other statements in appellants' brief, is not now open for discussion, it may not be deemed inappropriate to invite attention to the grave misconception of the contract with the Government which it discloses. It is in no sense correct to say that the services mentioned are "uncompensated." They are already paid for in advance by the grants. The railroad company agreed, by accepting the grants, to render those services as a part of the consideration of the grants. The maximum value of the grants was \$2.50 per acre. That, as we have seen, was the highest amount the railroad companies were permitted to receive out of the sale of the lands. The Chamberlain-Ferris Act secures that sum to them. In return

for it, they agreed to render the service mentioned and to do other things. How utterly out of accord with the facts, then, is it to say that such services are "uncompensated." Is the contract between the Government and the railroad company regarded by the latter as nothing more than a mere "scrap of paper"?

We see, therefore, that every existing right given to the railroads by the two granting acts is amply taken care of in the Chamberlain-Ferris Act. Consequently Congress has secured to the defendants "all the value conferred upon the railroads by the granting acts."

III.

THE COURT HAS POWER TO DETERMINE THE VALIDITY OF THE CHAMBERLAIN-FERRIS ACT IN CONNECTION WITH THIS APPEAL.

The mandate, as we have seen, directed the lower court to enter a decree and referred the disposition of the lands to Congress. Although Congress was not, of course, commanded to act, it was not only invited to do so, but its duty to act was made very clear. The preamble to the Chamberlain-Ferris Act in effect declares that Congress accepted the invitation and admitted the duty. The act is as much a part of the execution of the judgment of this court as the decree. Both are necessary to give it full effect. If Congress had failed to act, much of the potency of the judgment would be wasted. Appellants deny that the Chamberlain-Ferris Act is in consonance with the judgment, and predicate the same thing of the decree. Thus is presented the question as to whether, by the congressional act and court decree, the judgment

has been carried out in harmony with its terms. Why, then, is it not proper, as indeed it is *very desirable*, that the validity of the act should be decided in conjunction with that of the decree? True the validity of the former is not here on appeal. But is that material?

In *Clark Distilling Company v. Western Maryland Railway Company et al.*, decided Jan. 8, 1917, this court considered and gave effect to a statute of West Virginia passed after the case had reached the court on appeal, saying:

As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution.

United States v. Mormon Church (159 U. S. 145) was a case in which this court held that Congress had the power to "dispose" of the property of a defunct corporation (145). And the mandate directed the lower court to enter a judgment in conformity with the opinion of this court "unless in the meantime Congress should otherwise order." (147.) A decree was entered and from it an appeal taken to this court. Pending the appeal, Congress, as in the case at bar, took action resulting in a disposition of the property. This was brought to the attention of the court, which was asked to consider it in connection with the appeal. It did so, saying:

It will be perceived that judicial action is not sought to be controlled by the resolution

[of Congress], but that this court *having indicated* the mode to be pursued to ascertain and define the particular charitable uses, lawful in their character, to which the property should be devoted, in the absence of legislation upon the subject, and this appeal from the decree of the court below to that end having been taken, Congress has now declared such uses. (149.)

In the present case this court also indicated the course to be taken by the lower court "in the absence of legislation upon the subject." (238, U. S. 439, *supra*.)

Since it was proper to consider and give effect to the action of Congress in the *Mormon Church* case, it is equally proper, we submit, to consider and give effect to it here.

Besides, the power of the court to determine whether its mandate was obeyed is not appellate only. It could be invoked by a direct application for a mandamus. (*In re Potts*, 166 U. S. 263.) The power is an incident of the jurisdiction which the court exercised in deciding the original case. In asking the court to judge the validity of the Chamberlain-Ferris Act we call for an exercise of the same jurisdiction.

The only question then left is one of procedure, and as the Government and appellants unite in asking the court to decide the validity of the act in connection with this appeal, that question is waived.

Assuming the existence of the power, we trust the court will not decline to exercise it, for it is of great

importance to the public interest in Washington and Oregon that the validity of the act should be determined soon. Until it is, the appellants will resist any attempt on the part of the Government to deal with the lands, and the appellants are restrained from meddling with them. The lands constitute the greater part of the taxable property in many of the counties. For several years, as we have already stated, none of the taxes levied upon them have been paid and in consequence counties affected have been pushed to the verge of bankruptcy. The Government is ready to pay those taxes as soon as the validity of the act is adjudged.

In conclusion, permit us to urge that the decree of the lower court and the Chamberlain-Ferris Act are in strict accordance with the opinion and decision of this court and are therefore valid.

Respectfully submitted.

JOHN W. DAVIS,

Solicitor General.

CONSTANTINE J. SMYTH,

Special Assistant to the Attorney General.

MARCH 3, 1917.

